Supreme Court, U.S.
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No. 91-2003

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF CALIFORNIA AND CALIFORNIA STATE BOARD OF EQUALIZATION, RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: JUNE 12, 1992
CERTIORARI GRANTED: OCTOBER 5, 1992

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Docket No. 88-600

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA; AND CALIFORNIA STATE BOARD OF EQUALIZATION, DEFENDANTS

RELEVANT DOCKET ENTRIES

DATED	NR	PROCEEDINGS
05/12/88	1	Complaint; . . . summons issued
		* * * *
07/14/88	5	Answer by Defts. to complaint. . . .
08/02/88	6	Amended Answer to Comp. . . .
		* * * *
09/22/88		LDG: Second Amended Answer. . . .
		* * * *
09/30/88	10	Defts' Notc of Mot and Mot for Ord apprvg the filing of Sec Amd Answer LDG: Second Amended Answer. . . .
		* * * *

DATED	NR	PROCEEDINGS
11/22/88	13	Order: Defts' Mot to File Sec Amd Compl [sic] is hereby granted, and the Sec Amd Compl lodged in connection with the motion is now ordered filed. . . .
		* * * *
02/14/89	17	Defts' Notc of Mot S/J. . . .
		* * * *
02/14/89	20	Defts' Request for Judicial Notice. . . .
02/14/89	21	—Decl of Richard Nielsen in Supp of No. 17.
02/14/89	22	—Decl of Robert L. Milam in Supp. of No. 17.
		* * * *
02/15/89	25	Pltf's Mot for S/J. . . .
		* * * *
02/15/89	27	—Decl of Kenneth Meeks (Ex A)
02/15/89	28	—Decl of Raymond Harbert
02/15/89	29	Harbert Decl Attachments 1-24
02/15/89	30	Meeks Decl Attachment 1
		* * * *
02/27/89		Recv'd Defts' Oppo to Pltf's Mot for S/J
		* * * *
02/27/89	32	Pltf's Oppo to Defts' Mot for S/J
		* * * *
03/06/89	37	Memo Pts/Auth in Reply to Defts' Oppo to Pltf's Mot For S/J.
03/06/89	38	Defts' Reply to Pltf's Oppo to Defts' Mot for S/J.
		* * * *
04/25/89	39	Order: that Defts' Mot for S/J is Granted and Pltf's Mot for S/J is Denied.
04/25/89	40	Judgment is hereby entered pursuant to Court's order of 4-25-89, . . .
06/21/89	41	Pltf USAs' Notc of Appeal. . .

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 89-15833

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

STATE OF CALIFORNIA AND CALIFORNIA STATE BOARD OF EQUALIZATION, DEFENDANTS-APPELLEES

RELEVANT DOCKET ENTRIES

DATED	FILING-PROCEEDINGS
	* * * *
06/23/89	DOCKETED CAUSE AND ENTERED APPEARANCE OF COUNSEL. Sent appellant's civil appeals docketing statement. . .
	* * * *
05/16/91	Filed Opinion: Affirmed (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. ALARCON; POOLE; HATTER, author.) FILED AND ENTERED JUDGMENT. [89-15833] [ck]
05/30/91	Filed motion and order: (deputy clerk: dg) Aplt's motion for an extension of time to file petition for rehearing is granted. [1938632-1] petition for rehearing due 7/1/91 (motion received 5/30/91) [89-15833] [dg]

DATED	FILING-PROCEEDINGS
07/02/91	. . . Filed original and 40 copies Aplt USA petition for rehearing with suggestion for rehearing en banc 14p.pages, served on 6/28/91 (PANEL AND ACTIVE JUDGES) [89-15833] [dg]
03/18/92	Filed order (ARTHUR L. ALARCON, CECIL F. POOLE, TERRY J. HATTER); the petition for rehearing is denied and the suggestion for a rehearing en banc is rejected. [1957080-1] [89-15833] (dg)
03/27/92	MANDATE ISSUED [89-15833] (dg)
10/13/92	Filed Supreme Court order granting the petition for writ of certiorari under their No. 91-2003. (SC Date: 10/5/92) [89-15833] (dg)

* * * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Docket No. 88-600

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA; AND CALIFORNIA STATE BOARD OF EQUALIZATION, DEFENDANTS

COMPLAINT

(Filed May 12, 1988)

The plaintiff, the United States of America, by and through its undersigned attorneys, complains and alleges as follows:

1. This Court has jurisdiction over this action under Sections 1331, 1345 and 2201 of Title 28, United States Code, because this action arises under the United States Constitution, involves the interpretation of a federal contract, and is brought by the United States to obtain a declaratory judgment regarding the interests of the United States.

2. This is a civil action instituted by the United States for the purpose of obtaining (1) a declaratory judgment that a Department of Energy management and operating contractor at the Naval Petroleum Reserve was not a construction contractor under California law and that its purchases were therefore exempt from taxation because

they are sales for resale, and (2) a refund of the sales taxes and interest paid by the Government contractor.

3. This action is brought by the United States at the request of the Department of Energy (DOE), an agency of the United States, under the direction of the Attorney General of the United States, to vindicate the sovereign rights and pecuniary interests of the United States.

4. An actual controversy, as is more fully described below, has arisen and now exists between the United States and the defendants concerning their respective rights and claims and the plaintiff is suffering actual and threatened harm by virtue of the actions of the defendants.

5. The plaintiff, United States of America, is a corporate sovereign and body politic.

6. The defendant, the State of California, is a body politic and is named as a defendant because this action concerns the application of its tax statutes and the implementation thereof by its officials and because the plaintiff seeks a refund of taxes paid to the State.

7. The defendant, the California State Board of Equalization, is charged by California law with the interpretation and enforcement of its tax statutes including the sales tax law.

8. Naval Petroleum Reserve No. 1, known as the "Elk Hills Reserve," is located in Kern County, California. It consists of approximately 48,000 acres of land. Title to most of the Elk Hills property is in the United States having been withdrawn from the public domain pursuant to presidential executive orders authorized by the Pickett Act of 1910, 43 U.S.C., Section 141. A portion of the Elk Hills property is and has always been privately owned. The Reserve was initially placed under the jurisdiction of the Secretary of the Navy, then shifted to the Secretary of the Interior in 1921, and thereafter back to the Secretary of the Navy where it remained until October 1, 1977. Pursuant to the DOE Organization Act

(Pub. L. No. 95-91), the Secretary of Energy has been responsible for administering the Reserve since 1977 under authorities set forth in 10 U.S.C., Sections 7420 *et seq.*

9. Standard Oil Company of California (now Chevron U.S.A., Inc.), successor to the property rights of the Southern Pacific Railroad, has long been involved in the Elk Hills Reserve as a land owner. Chevron's present participation as an owner at Elk Hills is pursuant to a congressionally authorized Unit Plan Contract, which establishes the respective rights of Chevron and the United States Government in the Reserve and sets forth the terms and conditions for operating the Reserve as a unit. Chevron owns approximately 20% of the acreage comprising the Reserve, and the Government owns approximately 80%. Act of June 17, 1944, Ch. 262, 58 Stat. 282. This acreage is referred to as "Unit Land."

10. The Unit Land in the Reserve, pursuant to the 1944 Act and the Unit Plan Contract, is operated and managed by a contractor selected by the Secretary (formerly of the Navy, now of DOE). From 1944 to 1975, Chevron was the contractor for the Navy. From October 13, 1975 to July 31, 1985, Williams Brothers Engineering Company (WBEC) was the contractor for the Navy and DOE (Navy Contract No. NOd-10068; DOE Contract No. DE-AC01-80RA32049). From August 1, 1985 to the present, Bechtel Petroleum Operations, Inc., has been the contractor for DOE. The contracts between DOE and WBEC and Bechtel have been management and operating (M&O) contracts. The contract between the Navy and WBEC was in all material respects the same as a management and operating contract.

11. M&O contracts are one of the types of contracts authorized by the Government procurement regulations, the Federal Acquisition Regulations and by the DOE Acquisition Regulations. The Federal Acquisition Regulations define an M&O contract as "an agreement under

which the Government contracts for the operation, maintenance or support, on its behalf, of a Government-owned or controlled research, development, special production or testing establishment wholly owned or principally devoted to one or more major programs of the contracting Federal agency." 48 C.R.F., Ch. 1, Subpart 17.6.

12. In both contracts with WBEC, the Government retained responsibility for overall policy direction and program management technical direction of projects and all financial risk. Under both contracts, WBEC was hired for a fixed term and a fee and was generally responsible for the day-to-day management of operations and of support services such a administration and procurement. The physical labor necessary to perform construction was provided by independent contractors hired by WBEC. Although the nature of the contracts was "cost-reimbursement," funds were actually advanced by the Government pursuant to a provisional payment system under the Navy contract and a letter of credit for use by WBEC as needed under the DOE contract. This was provided for by Part II Section J.12 of the DOE-WBEC contract.

13. While WBEC managed and operated the Elk Hills Reserve it procured virtually all the personal property and services for the operations at the Reserve. The property WBEC purchased for the operation of the Reserve included office supplies and equipment, construction equipment, fuel and lubricants, automobiles and trucks, hand tools, safety and first aid equipment and oil field materials and equipment such as oil well casings, line and gathering pipe, pumps and compressors, valves, sucker rods and electric switching units. Both contracts provided in a standard Government property clause that title to all property purchased by the contractor for the Government passed from the vendor to the United States. The materials procured for the Government were either stored in inventory or used immediately by contractors other than WBEC, in construction or drilling operations.

14. WBEC was also responsible for the procurement of contractors to carry out construction and drillling activities. These construction contractors' services were procured at the direction of the owners, the United States and Chevron; and WBEC was obligated by the terms of the operating contracts to carry out those directions. However, WBEC was not liable to the successful completion of construction. Rather, the operating contractor was only obligated to follow the directives of the owners in awarding a contract to a construction contractor who had been approved by the owners. WBEC was prohibited from performing activities such as construction and drilling and WBEC was not insured against liability which might arise from such activities.

15. WBEC, as the operating contractor, was not responsible for the construction or drilling, but rather, was required to inspect and monitor the construction and drilling to ensure compliance by the construction and drilling contractors with the plans previously approved by the unit owners, Chevron and DOE. Under the WBEC operating contracts, directions governing drilling or construction originated with the owners, not with WBEC.

16. On July 5, 1978, the State of California issued a Notice of Determination to WBEC asserting a deficiency of $2,932,716.54, plus interest, in the payment of sales and use taxes for the years 1975-77. WBEC sought an administrative redetermination which ultimately led to an adverse decision which was appealed to the State Board of Equalization. The Board reduced the tax obligation by somewhat less than $400,000. The remainder of $2,550,334.86, with interest of $1,468,221.03, a total of $4,018,555.89, was paid under protest on May 13, 1982.

17. On December 13, 1982, a second Notice of Determination was issued by the State asserting a tax deficiency of $7,483,062.36, plus interest of $2,635,235.18, covering the period 1978-81. After an unsuccessful administrative appeal, the tax and interest which totaled

$10,118,297.54, were paid under protest on January 12, 1983.

18. The State concede that when the Government itself installed material purchased by WBEC, the contractor was not liable for sales taxes and refunded $1,355,306.39 for the 1975-77 period and $1,827,791.37 for the 1978-81 period to WBEC.

19. Pursuant to the contract between WBEC and DOE, WBEC paid the sales taxes with Government funds disbursed under a letter of credit issued by DOE. The refunds by the State of California were deposited in the United States Treasury.

20. Under the terms and conditions of the contracts between WBEC and the Government, WBEC was not responsible for the installation of the property it purchased and thus was not a construction contractor as defined by Cal. Sales and Use Tax Reg. 1521(a)(2) and (B). Therefore, purchases by WBEC were exempt from California sales taxes because the sales were for the purpose of resale since title to the property transferred to the Government upon delivery. Alternatively, a significant portion of the purchases made by WBEC were exempt from California sales taxes because the items purchased were machinery and equipment not affixed to the realty which under Cal. Reg. 1521(b) are nontaxable sales for resale.

WHEREFORE, the plaintiff, the United States of America, prays as follows:

1. That this Court enter a judgment declaring (1) that under the terms and conditions of the contracts between WBEC and the Government, WBEC was not responsible for the installation of the property it purchased and thus was not a construction contractor as defined by Cal. Sales and Use Tax Reg. 1521(a)(2) and (3), and that, therefore, purchases by WBEC were exempt from California sales taxes because the sales were for the purpose of resale since title to the property was transferred to the Government upon delivery, and, alternatively (3) that a

significant portion of the purchases made by WBEC were machinery and equipment not affixed to the realty which under Cal. Reg. 1521(b) are nontaxable sales for resale.

2. That this Court order the defendant to refund, with interest, the $14,136,853.43 in taxes and interest that WBEC paid on May 13, 1982, and January 12, 1983, to the State in sales taxes on the its purchases for DOE.

3. That this Court grant the plaintiff its costs in this action and such other and further relief as is just, equitable and proper.

Dated: May 10th, 1988.

Respectfully submitted,

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United States Attorney

YOSHINORI H. T. HIMEL
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

SECOND AMENDED ANSWER

(Filed September 22, 1988)

Defendants STATE OF CALIFORNIA and STATE BOARD OF EQUALIZATION hereby answer the complaint for declaratory relief and for refund of taxes by admitting, denying and alleging as follows:

1. Deny the allegations contained in paragraphs 1, 12, 14, 15 and 20 of said complaint.

2. Admit the allegations contained in paragraphs 5, 7, 8, and 11 of said complaint.

3. Admit the allegations contained in paragraph 2 of said complaint only to the extent that the paragraph describes the allegations in the complaint. In further answer to the allegations contained in paragraph 2, defendants deny that a Department of Energy management and operating contractor at the Naval Petroleum Reserve is not a construction contractor and deny that a refund of taxes is due.

4. Admit the allegations contained in paragraph 3, save and except for the allegation that the suit seeks to vindicate the sovereign right and pecuniary interest of the United States, which allegation is denied.

5. Deny the allegations contained in paragraph 4, of said complaint. In further answer to the allegations contained in paragraph 4, defendants allege that the United States Government has no standing to bring this suit

because no tax was assessed against the United State and no tax was collected from or paid by the United States.

6. Admit the allegations contained in paragraph 6 of said complainnt, save and except for the allegation that the United States seek a refund of taxes that it paid to the state, which allegation is denied. In further answer to the allegations contained in paragraph 6, defendants allege that the taxes were paid by WBEC and not by the United States.

7. In answering the allegations contained in paragraph 9 of said complaint, defendants have no information or knowledge of the actual percentage of the total acreage owned by Chevron, and on that basis deny the allegations contained therein.

8. Admit the allegations contained in paragraph 10 of said complaint. In further answer to the allegations contained in paragraph 10, defendants allege that the contracts between DOE and WBEC and the Navy and WBEC are contracts for the construction of improvements to real property within the meaning of California Revenue and Taxation Code sections 6384 and 6007.5 and Regulation 1521.

9. Admit the allegations contained in paragraph 13 of said complaint, save and except for the allegation that the Government Property Clause passes title to the property purchased from the vendor directly to the United States, which allegation is denied.

10. Admit the allegations contained in the first sentence of paragraph 16. In further answer to the allegations contained in the first sentence of paragraph 16, defendants allege that the actual period of determination was November 14, 1975 to December 31, 1977. Defendants admit the allegations contained in the second sentence of paragraph 16. Defendants admit the allegations contained in the third sentence of paragraph 16, except defendant alleges that the Board records show that the payment of $4,018,555.59 to have been made effective April 30, 1982.

11. Admit the allegations contained in paragraph 17 of said complaint. In further answer to the allegations contained in paragraph 17, defendants allege that on December 13, 1982, defendant Board of Equalization issued two notices of determination to WBEC, which together covered the period January 1, 1978 to December 31, 1981, a total tax deficiency of $7,483,062.26 and the amount of interest calculated through December 13, 1982, was $2,598,332.48 and that payment was made on December 23, 1982.

12. Admit the allegations contained in paragraph 18 of said complaint. In further answer to the allegations contained in paragraph 18, defendants allege that these refunds were granted by defendant Board of Equalization in two suits for tax refund brought by WBEC in state court. These suits are Los Angeles County Superior Court case numbers C 473 190 and C 443 028, cover the same periods and same liability as in this action, and were dismissed after the refunds were granted.

13. Defendants have no knowledge or information sufficient to enable them to answer the allegations contained in paragraph 19 of said complaint and upon that basis deny the allegations contained therein. In further answer to the allegations contained in paragraph 19, defendants allege that WBEC paid the taxes and WBEC was the recipient of those amounts refunded.

AFFIRMATIVE DEFENSES

As a first, separate, and affirmative defense defendants allege:

1. Plaintiff's claim for declaratory relief is not appropriate in this case because there is no controversy between the parties to the contract about the meaning of the contract.

As a second, separate and affirmative defense, defendants allege:

2. Plaintiffs have failed to join an indispensible party to the action, WBEC the other party to the contract for which declaratory relief is requested.

As a third, separate and affirmative defense, defendants allege:

3. Plaintiffs are precluded from pursuing the claims and/or issues raised in this action by the application of the principles of res judicata and/or collateral estoppel.

As a fourth, separate and affirmative defense, defendants allege:

4. Plaintiffs are precluded from the Statute of Limitations in 28 United States Code section 2415(a) from pursuing this action in that the suit was not brought within six years of the time the cause of action occurred.

WHEREFORE, defendants pray as follows:

1. That this Court determine and adjudge that defendant Board of Equalization properly imposed a tax against WBEC for the amounts and time periods alleged in this answer;

2. That the Court determine and adjudge that the suits filed by WBEC in state court for the same amounts and for the same periods alleged in the complaint preclude the United States from pursuing these claims in this Court;

3. That this Court determine and adjudge that the United States was not assessed any tax nor paid any tax assessed by the State of California;

4. That plaintiff takes nothing by this action;

5. That defendant recover its costs in this action; and

6. That this Court order such other and further relief as is just, equitable, and proper.

DATED: September 21, 1988

JOHN K. VAN DE CAMP
Attorney General
of the State of California
ROBERT F. TYLER
Supervising Deputy
Attorney General

By: /s/ Robert D. Milam
ROBERT D. MILAM
Deputy Attorney General

Attorneys for Defendants
State Board of Equalization

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

DEFENDANTS' AMENDED NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

(Filed February 14, 1989)

PLEASE TAKE NOTICE that on March 31, 1989, at 1:30 p.m. or as soon thereafter as the matter may be heard before the Honorable Lawrence K. Karlton, Chief Judge of the United States District Court located at 650 Capitol Mall, Sacramento, California, defendants will move the Court for summary judgment in favor of defendants and against plaintiffs. The grounds of said motion are as follows:

1. Plaintiff is precluded by the principles of Res Judicata/Collateral Estoppel from maintaining this action;
2. Plaintiff is barred by the Statute of Limitation in 28 United States Code section 2415 from recovering at least one of the payments sought in this action; and
3. WBEC is as a matter of law a construction contractor under its contract with the United States.

This motion will be based upon this motion, the Defendant's Statement of Undisputed Fact, the Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, Defendants' Request for Judicial Notice, the Declaration of Robert D. Milam in Support of Defendants' Motion for Summary Judgment, the Declaration of Donald J. Hennessy in Support of Defendants' Motion for Summary Judgment, the

Declaration of Richard D. Nielsen in Support of Defendants' Motion for Summary Judgment, and such other evidence as may be adduced at the hearing on said matter.

DATED: February 15, 1989

JOHN K. VAN DE KAMP
Attorney General
of the State of California
ROBERT F. TYLER
Supervising Deputy
Attorney General

By /s/ Robert D. Milam
ROBERT D. MILAM
Deputy Attorney General

Attorneys for Defendants

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

DEFENDANTS' REQUEST FOR JUDICIAL NOTICE

(Filed February 14, 1989)

Defendant Board of Equalization of the State of California hereby requests this Court to take judicial notice of the following documents:

1. Certified copy of the Complaint and attached exhibits in the case of *Williams Brothers Engineering Company* v. *Board of Equalization of the State of California*, Los Angeles County Superior Court No. C 443 028. This complaint is attached hereto as Exhibit A.

2. Certified copy of the Complaint and attached exhibits in the case of *Williams Brothers Engineering Company* v. *Board of Equalization of the State of California*, Los Angeles County Superior Court No. C 473 190. This complaint is attached hereto as Exhibit B.

3. A certified copy of the Partial Judgment Pursuant to Stipulation in Los Angeles County action number C 443 028. The Stipulation is attached hereto as Exhibit C.

4. A certified copy of the Notice of Dismissal in Los Angeles County action number C 443 028. This Notice is attached hereto as Exhibit D.

5. A certified copy of the Partial Judgment Pursuant to Stipulation in Los Angeles County action number C 473 190. The stipulation is attached hereto as Exhibit E.

6. A certified copy of the Notice of Dismissal in Los Angeles County action number C 473 190. This Notice is attached hereto as Exhibit F.

7. A copy of the transcript of the hearing on the Petition for Redetermination before the Board of Equalization held on January 8, 1981, and certificated by the reporter. The transcript is attached hereto as Exhibit G.

8. The official publication of Regulation 1521 in title 18, California Administrative Code, section 1521. A copy of the official regulation is attached hereto as Exhibit H.

DATED: Feb. 13, 1989

JOHN K. VAN DE KAMP
Attorney General
of the State of California
ROBERT F. TYLER
Supervising Deputy
Attorney General

By /s/ Robert D. Milam
ROBERT D. MILAM
Deputy Attorney General

Attorneys for Defendant
State Board of Equalization

EXHIBIT "A"

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No. C443028

WILLIAMS BROTHERS ENGINEERING COMPANY,
an Oklahoma Corporation, PLAINTIFF

vs.

BOARD OF EQUALIZATION OF THE
STATE OF CALIFORNIA, DEFENDANT

COMPLAINT FOR REFUND OF CALIFORNIA SALES TAX PAID

[Filed Feb. 18, 1983]

Plaintiff alleges:

I.

At all times mentioned herein, Plaintiff, WILLIAMS BROTHERS ENGINEERING COMPANY, is and at all relevant times has been a corporation organized and existing under the laws of the State of Oklahoma, with its principal place of business in Kern County.

II.

Defendant, BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, is, and at all material times herein was, an agency of the State of California charged by law with the duty of administering the California Sales and Use Tax Law.

III.

Jurisdiction of this action is vested in this court under California Code of Civil Procedure § 410.10.

IV.

Venue of this section is properly based in Los Angeles County under California Revenue and Taxation Code § 6933, as the Attorney General has an office in Los Angeles County.

V.

Plaintiff filed California Sales and Use Tax returns with Defendant when due for the period between November 14, 1975, through December 31, 1977, and Plaintiff timely paid all taxes so reported to Defendant when due.

VI.

Upon audit of Plaintiff, Defendant sent Plaintiff a Notice Of Determination under the Sales And Use Tax Law, dated July 5, 1978, stating that a deficiency in sales and use tax in the amount of $2,932,716.54 plus interest was due for the period commencing November 14, 1975, through December 31, 1977. On August 3, 1978, Plaintiff filed a Petition For Redetermination with Defendant, requesting a hearing. On January 30, 1979, a hearing before Defendant was held. On April 13, 1982, Plaintiff received notice from Defendant of its order that the deficiency in taxes originally determined be reduced by $382,381.68, leaving a balance of tax owed as redetermined of $2,550,334.86 plus interest of $1,468,221.03, for a total of taxes plus interest owed of $4,018,555.89. On or before May 13, 1982, Plaintiff paid said amount to Defendant under protest. On October 1, 1982, Plaintiff filed a Claim For Refund with the Defendant. Defendant denied the Claim For Refund and sent Notice Of Denial Of Claim For Refund on November 22, 1982. This

action is brought within ninety days of the date of such Notice. Accordingly, Plaintiff has exhausted its administrative remedies and now brings this court action under authority of California Revenue and Taxation Code § 6933.

VII.

Said asserted deficiency of $4,018,555.89 for the period commencing November 14, 1975, and ending December 31, 1977, was arbitrarily, erroneously, and illegally determined by Defendant on the basis of grossly incorrect and unwarranted assumptions, and without foundation in fact.

VIII.

The Claim For Refund filed by Plaintiff on October 1, 1982, with Defendant is attached hereto, marked Exhibit "A," and made a part hereof as though set forth in full, except for Paragraph 5.C thereof. In light of the facts set forth in the Claim for Refund incorporated herein, the alleged deficiency as set forth in the Notice of Redetermination, and the taxes collected pursuant thereto, are illegal, erroneous, excessive, and improper in that:

A. If Plaintiff is regarded, contrary to the provisions of the contract, as having acquired materials from vendors and then reselling the materials to the United States Government, such transactions by Plaintiff cannot be subjected to the California sales tax by reason of California Revenue and Taxation Code § 6381.

B. No tax can be assessed against Plaintiff on the authority of California Revenue and Taxation Code § 6384. That section provides only for a sales tax to be imposed on the vendor. If any sales tax were payable on purchases by Plaintiff on behalf of the Goverment, such tax would be due only by those vendors and could not be assessed against Plaintiff.

C. Further, no tax would be due from Plaintiff or any of the persons who supplied materials to Plaintiff

under California Revenue and Taxation Code § 6384 inasmuch as Plaintiff was not a "construction contractor" within the meaning of that section. This is true as to all of the materials purchased by Plaintiff.

D. Plaintiff cannot be subject to use tax on any of the property purchased by the United States Government through Plaintiff since Plaintiff never held title to any of these items and cannot, therefore, make a taxable "use" of these materials. *Lockheed Aircraft Corp. v. State Board of Equalization*, 81 Cal. App. 3d 257 (1978).

E. No tax was due from Plaintiff or any of those persons who supplied materials to Plaintiff on purchases made by Plaintiff under the contract for the United States Government since Plaintiff was acting solely as an agent for the United States Government, and imposition of a tax on purchases made by the United States Government is prohibited by California Revenue and Taxation Code § 6381.

F. As to the NAVFAC procurements, a refund based on the exclusion of $10,166,154.18 from the measure of the tax should be made.

WHEREFORE, Plaintiff prays for judgment against Defendant

(1) in the amount of $4,018,555,89 and such other amounts to which Plaintiff may be entitled,

(2) for interest allowable by statute,

(3) for cost of suit hereof, and

(4) for such other and further relief as this court may deem just and proper.

Date: 2-18-'83

ARMSTRONG, HENDLER & HIRSCH
A Professional Corporation

By: s [Illegible]
Attorneys for Plaintiff

VERIFICATION

I am an officer of the Plaintiff in the above entitled proceeding; I have read the foregoing Complaint and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on February 17, 1983 at Elk Hills, California.

/s/ Raymond C. Harbert
(Name)
RAYMOND C. HARBERT
Vice President
(Title)

October 1, 1982

State Board of Equalization
1020 North Street
Sacramento, California 95814

Attention: Refund Unit

Re: *Claim for Refund, California Sales Tax Matter*

Gentlemen:

Williams Brothers Engineering Company ("Taxpayer" or "WBEC") herein, the person against whom the determination described below was made, on behalf of itself and the United States Government, the real party in interest, respectfully submits the following Claim for Refund ("Claims"):

1. *Identification of Taxpayer.*

Williams Brothers Engineering Company
P.O. Box 86
Tupman, California 93276

2. *Periods Involved.*

November 14, 1975, through December 31, 1977

3. *Prior Proceedings.*

Taxpayer filed a Petition for Redetermination (the "Petition"), and a hearing was held by the State Board of Equalization. A Notice of Redetermination, attached as Exhibit 1, dated April 13, 1982, was served on Taxpayer. Taxpayer timely paid the alleged deficiency. This Claim is filed within 6 months of the date of such payment.

4. *Refund Claimed.*

A refund is claimed for the entire amount paid as above set forth, in the amount of $2,550,334.86, together with interest as provided by law.

5. *Grounds for Refund.*

5.A *Factual Background.*

This claim for refund is filed as required by Section 6932 (all section references, unless otherwise indicated are to the California Revenue and Taxation Code) for the purpose of exhausting Taxpayer's administrative remedies in order that the issues here involved can be tested through appropriate litigation. The factual matters upon which the Claim is based, and many of the legal arguments, have been the subject of extensive submissions to the Board of Equalization in connection with the Petition. Taxpayer hereby incorporates by reference the factual submission designated "Preliminary and Jurisdictional Statement", which included copies of all of the relevant documents, submitted to Mr. D. J. Hennessey at a Staff Hearing on January 30, 1979, and the Supplemental Brief submitted to the Board of Equalization following the hearing before it on January 8, 1981.

As set forth in those materials, Petitioner entered into a contract with the United States Government, through the Secretary of Navy (now Secretary of Energy pursuant to P.L. 95-91), dated October 13, 1975. For convenience, an additional copy of that contract is appended hereto as Exhibit 2.

Pursuant to the said Contract, Petitioner, acting on behalf of the United States Government and not in its own right, negotiated with various suppliers to provide articles of tangible personal property to be used by the United States Government in work being conducted at Elk Hills. Under the terms of the Contract with the United States Government, Petitioner never had title to any of such materials, and did not become the beneficial owner of any interest therein. Title thereto passed directly from the various vendors to the United States Government pursuant to the provisions of the Contract, and of various agreements with vendors which were ne-

gotiated by Petitioner on behalf of the United States Government.

The materials acquired by the United States Government through WBEC were, in general, ultimately used in the construction of improvements to the Elk Hills facilities.

In some cases, installation of the materials in connection with projects was administered by WBEC. In that capacity, WBEC has the responsibility of hiring a subcontractor designated by the United States Government to complete installation of the material. WBEC did not, however, have responsibility for the job or for completion of the installation. Its function was solely that of servicing the administration of the contract, and not of a construction contractor.

Certain materials acquired by the United States Government through WBEC were placed in inventory. From inventory, they were drawn on as needed for installation in various projects at Elk Hills. Some of these projects were ones administered by other contractors; some of them were administered by WBEC.

In both of these cases, it is WBEC's position that it was not a "construction contractor" within the meaning of Section 6384. The conclusion to the contrary set forth in the Notice of Redetermination is erroneous.

5.B *Special Item: The NAVFAC Procurements.*

The Board, in its Notice of Redetermination, and throughout these proceedings, has apparently agreed that amounts reflecting the cost of materials purchased through WBEC which were installed by the Naval Facilities Commond ("NAVFAC"), on the LTS#1 Plant and the High Pressure Injection Plant should be excluded from the measure of the tax, since WBEC's only function as to these procurements relates to purchasing, and WBEC is not the "construction contractor" within the meaning of Section 6384 as to these procurements.

Despite this agreement on the legal issues the measure of the tax set forth in the Notice of Redetermination does not exclude the cost of materials procured for these projects on the grounds that "documentation necessary to delete" these purchases had not been submitted.

There is attached as Exhibit "3" a Summary setting forth the amount of these procurements improperly included in the measure of the tax, aggregating $10,166,154.18. The invoices described thereon are not submitted here since their bulk renders such a submission impractical. They are, however, available at the offices of the Taxpayer for review and audit.

5.C *Legal Basis for Refund.*

In the light of the foregoing, the alleged deficiency as set forth in the Notice of Redetermination, and the taxes collected pursuant thereto, are illegal, erroneous, excessive and improper in that:

A. If WBEC is regarded, contrary to the provisions of Contract as having acquired materials from vendors, and then reselling it to the United States Government, such transactions by WBEC cannot be subjected to the California sales tax by reason of the United States Constitution and Section 6381.

B. No tax can be assessed against WBEC on the authority of Section 6384. That Section provides only for a sales tax to be imposed on the vendor. If any sales tax were payable on purchases by WBEC on behalf of the Government, such tax would be due only by those vendors, and could not be assessed against WBEC.

C. Further, no tax would be due from WBEC or any of the persons who supplied materials to WBEC under Section 6384 inasmuch as WBEC was not a "construction contractor" within the meaning of that section. This is true as to all of the materials purchased by WBEC.

D. WBEC cannot be subject to use tax on any of the property purchased by the United States Government

through WBEC since WBEC never held title to any of these items and cannot, therefore, make a taxable "use" of these materials. *Lockheed Aircraft Corp. v. State Board of Equalization*, 81 Cal.App. 3d 257 (1978).

E. No tax was due from WBEC or any of those persons who supplied materials to WBEC on purchases made by WBEC under the contract for the United States Government since WBEC was acting solely as an agent for the United States Government, and imposition of a tax on purchases made by the United States Government is prohibited by the Constitution of the United States, and by Section 6381.

F. The application of the California Sales Use Tax to the purchase of materials by the United States Government under Section 6384 would discriminate against the Government and those doing business with it, in that the basis of the tax is different from that applicable to contractors doing business with private parties and with California governmental entities.

G. As to the NAVFAC procurements, a refund based on the exclusion of $10,166,154.18 from the measure of the tax should be made.

6. *Communications.*

It is respectfully requested that copies of all future notices and correspondence be sent to Taxpayer's representative:

Arthur O. Armstrong, Esq.
Armstrong, Hendler & Hirsch
1888 Century Park East, Suite 1888
Los Angeles, California 90067
Telephone: (213) 553-0305

Executed at Elk Hills, California, on this 7th day of October, 1982.

WILLIAMS BROTHERS
ENGINEERING COMPANY

By: /s/ C. H. Barnfield
C. H. BARNFIELD
General Manager

EXHIBIT "B"

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No. C473090

WILLIAMS BROTHERS ENGINEERING COMPANY,
an Oklahoma Corporation, PLAINTIFF

vs.

BOARD OF EQUALIZATION OF THE
STATE OF CALIFORNIA, DEFENDANT

COMPLAINT FOR REFUND OF CALIFORNIA
SALES TAX PAID

[Filed Oct. 26, 1983]

Plaintiff alleges:

I.

At all times mentioned herein, Plaintiff, WILLIAMS BROTHERS ENGINEERING COMPANY, is and at all relevant times has been a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Tulsa, Oklahoma.

II.

Defendant, BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, is, and at all material times herein was, an agency of the state

of California charged by law with the duty of administering the California Sales and Use Tax Law.

III.

Jurisdiction of this action is vested in this court under Cal. Civ. Proc. Code § 410.10.

IV.

Venue of this action is properly based in Los Angeles County under Cal. Rev. & Tax. Code § 6933, as the Attorney General has an office in Los Angeles County.

V.

Plaintiff filed California Sales and Use Tax returns with Defendant when due for the period between January 1, 1978, through December 31, 1981, and Plaintiff timely paid all taxes so reported to Defendant when due.

VI.

Upon audit of Plaintiff, Defendant sent Plaintiff a Notice of Determination under the Sales and Use Tax Law, dated December 13, 1982, stating that a deficiency in sales and use tax in the amount of $7,483,062.36 plus interest was due for the period commencing January 1, 1978, through December 31, 1981. On or before January 12, 1983, Plaintiff paid $10,118,297.54, representing the alleged deficiency plus interest, to Defendant under protest. On May 25, 1983, Plaintiff filed a Claim for Refund with the Defendant. Defendant denied the Claim for Refund and sent a Notice of Denial of Claim for Refund on August 2, 1983. This action is brought within ninety days of the date of such Notice. Accordingly, Plaintiff has exhausted its administrative remedies and now brings

this court action under authority of Cal. Rev. & Tax. Code § 6933.

VII.

Said asserted deficiency of $7,483,062.36 for the period commencing January 1, 1978, and ending December 31, 1981, was arbitrarily, erroneously, and illegally determined by Defendant on the basis of grossly incorrect and unwarranted assumptions, and without foundation in fact.

VIII.

The Claim for Refund filed by Plaintiff on May 25, 1983, with Defendant is attached hereto, marked Exhibit "A," and made a part hereof as though set forth in full. In light of the facts set forth in the Claim for Refund incorporated herein, the alleged deficiency as set forth in the Notice of Denial, and the taxes collected pursuant thereto, are illegal, erroneous, excessive, and improper in that:

A. If WBEC is regarded, contrary to the provisions of the Contract as having acquired materials from vendors, and reselling it to the United States Government, such transactions by WBEC cannot be subject to the California sales tax by reason of the United States Constitution and Cal. Rev. & Tax. Code § 6381.

B. No tax can be assessed against WBEC on the authority of Cal. Rev. & Tax. Code § 6384. That section provides only for a sales tax to be imposed on the vendor. If any sales tax were payable on purchases by WBEC on behalf of the government, such tax would be due only by those vendors, and could not be assessed against WBEC.

C. Further, no tax would be due from WBEC or any of the persons who supplied materials to WBEC under § 6384 inasmuch as WBEC was not a "construction contractor" within the meaning of that section. That is true as to all of the materials purchased by WBEC.

D. WBEC cannot be subject to use tax on any of the property purchased by the United States government through WBEC since WBEC never held title to any of these items and cannot, therefore, make a taxable "use" of these materials. *Lockheed Aircraft Corp. v. State Board of Equalization*, 81 Cal. App. 3d 257 (1978).

E. No tax is owed for that property that never was incorporated into real property improvements, because § 6384 only covers improvements to real property, and other purchases by the United States government would be exempt under § 6381.

F. To the extent that sales tax was paid to other states, WBEC is entitled to a credit against California tax under Cal. Rev. & Tax. Code § 6406.

G. No tax may be imposed on WBEC's leasing of tangible personal property from lessors to the extent the lessors paid sales tax reimbursement or use tax on their purchase of the property. Cal. Rev. & Tax. Code § 6006 (g)(5).

H. The materials used in construction by NAVFAC should be excluded from the measure of tax because WBEC's only function as to these procurements relates to purchasing, and WBEC is not the "construction contractor" within the meaning of § 6384 as to these procurements.

I. No sales or use tax can be imposed on WBEC because the United States, not WBEC, was the only party that purchased or used the property.

J. Cal. Rev. & Tax. Code § 6384 unconstitutionally discriminates against the United States Government and those doing business with it.

WHEREFORE, Plaintiff prays for judgment against Defendant

(1) in the amount of $10,118,297.54 and such other amounts to which Plaintiff may be entitled,

(2) for interest allowable by statute,

(3) for cost of suit hereof and

(4) for such other and further relief as this court may deem just and proper.

Date: 10-26-83

ARMSTRONG, HENDLER & HIRSCH
A Professional Corporation

By: s/ [Illegible]
Attorneys for Plaintiff

May 25, 1983

State Board of Equalization
1020 N Street
Sacramento, California 95814

Attention: Refund Unit

Re: *Claim for Refund, California Sales Tax Matter*

Gentlemen:

Williams Brothers Engineering Company ("Taxpayer" or "WBEC") herein, the person against whom the determination described below was made, on behalf of itself and the United States government, the real party in interest, respectfully submits the following Claim for Refund ("Claim"):

1. *Identification of Taxpayer*

Williams Brothers Engineering Company
P.O. Box 86
Tupman, California 93276

2. *Periods Involved*

January 1, 1978, through December 31, 1981

3. *Prior Proceedings*

Notices of Determination, attached as Exhibit 1, dated December 13, 1982, were served on Taxpayer. Taxpayer timely paid the alleged deficiency. This Claim is filed within six months of the date of such payment.

4. *Refund Claimed*

A refund is claimed for the entire amount paid as above set forth, in the amount of $10,118,297.54, together with interest as provided by law.

5. *Grounds for Refund*

5.A. *Factual Background*

This Claim for refund is filed as required by Section 6932 (all section references, unless otherwise indicated are to the California Revenue and Taxation Code) for the purpose of exhausting Taxpayer's administrative remedies in order that the issues herein involved can be tested through appropriate litigation. The factual matters upon which the Claim is based, and many of the legal arguments, have been the subject extensive submissions to the Board of Equalization in connection with a Petition for Redetermination filed for the period November 14, 1975, through December 31, 1977, in connection with an alleged deficiency for the period prior to the period involved in this Claim. Taxpayer hereby incorporates by reference the factual submission designated "Preliminary and Jurisdictional Statement," which included copies of all of the relevant documents, submitted to Mr. D. J. Hennessey at a Staff Hearing on January 30, 1979, and the Supplemental Brief submitted to the Board of Equalization following the hearing before it on January 8, 1981, in connection with the Petition for Redetermination.

As set forth in those materials, Petitioner entered into a contract ("Contract") with the United States government, through the Secretary of Navy (now the Secretary of Energy pursuant to P.L. 95-91), dated October 13 1975. For convenience, an additional copy of the Contract is appended hereto as Exhibit 2.

Pursuant to the Contract, Petitioner, acting on behalf of the United States government and not in its own right, negotiated with various suppliers to provide articles of tangible personal property to be used by the United States government in work being conducted at Elk Hills. Under the terms of the Contract with the United States government, Petitioner never had title to any of such materials,

and did not become the beneficial owner of any interest therein. Title thereto passed directly from the various vendors to the United States government pursuant to the provisions of the Contract and of various agreements with vendors which were negotiated by Petitioner on behalf of the United States government.

The majority of the materials acquired by the United States government through WBEC were ultimately used in the construction of improvements to the Elk Hills facilities. However, some tangible personal property acquired by the United States government was never incorporated into any real property improvements.

In some cases, installation of the materials in connection with projects was administered by WBEC. In that capacity, WBEC had the responsibility of hiring a subcontractor designated by the United States government to complete installation of the material. WBEC did not, however, have responsibility for the job or for completion of the installation. Its function was solely that of servicing the administration of the contract, and not of a construction contractor.

Certain materials acquired by the United States government through WBEC were placed in inventory. From inventory, they were drawn on as needed for installation in various projects at Elk Hills. Some of these projects were ones administered by other contractors; some of them were administered by WBEC. In both of these cases, it is WBEC's position that it was not a "construction contractor" within the meaning of Section 6384.

Certain of the materials were purchased out of state and sales tax was paid in those states.

Much of the property on which tax was assessed was leased from lessors. In many instances, the lessors had paid sales tax reimbursement or use tax on their purchase of the property.

Much of the materials purchased by the United States Government through WBEC were installed by the Naval

Facilities Command ("NAVFAC"), on the LTS # 1 Plant and the High Pressure Injection Plant.

5.B. *Legal Basis for Refund*

In the light of the foregoing, the alleged deficiency as set forth in the Notices of Determination, and the taxes collected pursuant thereto, are illegal, erroneous, excessive, and improper in that:

A. If WBEC is regarded, contrary to the provisions of the Contract as having acquired materials from vendors, and reselling it to the United States government, such transactions by WBEC cannot be subjected to the California sales tax by reason of the United States Constitution and Section 6381.

B. No tax can be assessed against WBEC on the authority of Section 6384. That Section provides only for a sales tax to be imposed on the vendor. If any sales tax were payable on purchases by WBEC on behalf of the government, such tax would be due only by those vendors, and could not be assessed against WBEC.

C. Further, no tax would be due from WBEC or any of the persons who supplied materials to WBEC under Section 6384 inasmuch as WBEC was not a "construction contractor" within the meaning of that section. This is true as to all of the materials purchased byWBEC.

D. WBEC cannot be subject to use tax on any of the property purchased by the United States government through WBEC since WBEC never held title to any of these items and cannot, therefore, make a taxable "use" of these materials. *Lockheed Aircraft Corp. v State Board of Equalization*, 81 Cal.App. 3d 257 (1978).

E. No tax was due from WBEC or any of those persons who supplied materials to WBEC on purchases made by WBEC under the contract for the United States government since WBEC was acting solely as an agent for the United States government, and imposition of a tax on purchases made by the United States government is

prohibited by the Constitution of the United States and by Section 6381.

F. The application of the California Sales and Use Tax to the purchase of materials by the United States government under Section 6384 would discriminate against the government and those doing business with it, in that the basis of the tax is different from that applicable to contractors doing business with private parties and with California governmental entities.

G. No tax is owed for that property that never was incorporated into real property improvements, because § 6384 only covers improvements to real property, and other purchases by the United States government would be exempt under Section 6381.

H. To the extent that sales tax was paid to other states, WBEC is entitled to a credit against California tax under Section 6406.

I. Because WBEC is an agent of the United States government, no use tax may be imposed on WBEC's leasing of tangible personal property from lessors by reason of the United States Constitution and Section 6352. Further, no sales tax may be imposed on the lessors of the leased property because the legal incidence of such tax falls on the United States government. *U.S. v. California S.B.E.*, 650 F.2d 1127 (9th Cir. 1981).

J. No tax may be imposed on WBEC's leasing of tangible personal property from lessors to the extent the lessors paid sales tax reimbursement or use tax on their purchase of the property. Section 6006(g)(5).

K. The materials used in construction by NAVFAC should be excluded from the measure of tax because WBEC's only function as to these procurements relates to purchasing, and WBEC is not the "construction contractor" within the meaning of § 6384 as to these procurements.

6. *Communications*

It is respectfully requested that copies of all future notices and correspondence be sent to Taxpayer's representative:

Arthur O. Armstrong, Esq.
Armstong. Hendler & Hirsch
1888 Centry Park East, Suite 1888
Los Angeles, California 90067

Executed at Elk Hills, California, on this 3rd day of June, 1983.

WILLIAMS BROTHERS ENGINEERING COMPANY

By: s/ C. H. Barfield
C. H. BARFIELD
General Manager

VERIFICATION

I am an officer of the Plaintiff in the above entitled proceeding; I have read the foregoing Complaint and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on 14 October 1983 at Tupman, California.

s/ Raymond C. Harbert
RAYMOND C. HARBERT
Vice President
(Title)

EXHIBIT "C"

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C 443 028

WILLIAM BROTHERS ENGINEERING COMPANY,
an Oklahoma corporation, PLAINTIFF

v.

BOARD OF EQUALIZATION OF THE
STATE OF CALIFORNIA, DEFENDANT

PARTIAL JUDGMENT PURSUANT TO
STIPULATION

WHEREAS, plaintiff has instituted this action against defendant; and

WHEREAS, plaintiff and defendant have settled the issue presented in subparagraph F of paragraph VIII of the Complaint and have stipulated that the above named plaintiff shall have partial judgment against defendant;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above named plaintiff recover from defendant State Board of Equalization the sum of $609,969.25, plus interest on said sum to the date of entry of partial Judgment in the above entitled action (which date shall be deemed to be August 1, 1985) in the sum of $737,217.11, for a total sum of $1,347,286.36, plus

interest on said total according to law, with each party to bear its own costs.

Dated: 7-12-85.

/s/ Bertrand D. Moore
BERTRAND D. MOORE
Judge Pro Tempore

Name, Address and Telephone No. of Attorney(s)

Arthur O. Armstrong, E .
Armstrong, Hirsch & Levine
1888 Century Park East, #1888
Los Angeles, CA 90067
Telephone: (213) 553-0305

Attorney(s) for Plaintiff

Space Below for Use of Court Clerk Only C 2 18 5
A: 3 21 54

FILED

JAN 25 1988

FRANK S. ZOLIN, COUNTY CLERK

Anita Jones

BY ANITA JONES, DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
(SUPERIOR, MUNICIPAL, or JUSTICE)

(Name of Municipal or Justice Court District or of branch court, if any)

Plaintiff(s)

Williams Brothers Engineering Company, an Oklahoma corporation

Defendant(s)

State Board of Equalization of the State of California

(Abbreviated Title)

CASE NUMBER C 443 028

REQUEST FOR DISMISSAL

TYPE OF ACTION

- ☐ Personal Injury, Property Damage and Wrongful Death
  - ☐ Motor Vehicle
  - ☐ Other
- ☐ Domestic Relations
- ☐ Eminent Domain
- ☒ Other (Specify) Refund of Taxes

TO THE CLERK. Please dismiss this action as follows: (Check applicable boxes)

1. ☐ With prejudice ☒ Without prejudice
2. ☐ Entire action ☐ Complaint only ☐ Petition only ☐ Cross-complaint only
   ☒ Other: (Specify)*

Dismiss entire action without prejudice except for issues presented in subparagraph F of Paragraph VIII of the Complaint which were resolved and settled pursuant to Stipulation for Partial Judgment, previously filed in this action, and the Partial Judgment entered pursuant thereto.

Dated January 22, 1988

*If dismissal requested is of specified parties only, of specified causes of action only or of specified cross-complaints only so state and identify the parties, causes of action or cross-complaints to be dismissed

Attorney(s) for Plaintiff

Arthur O. Armstrong
(Type or print attorney(s) name(s))

TO THE CLERK: Consent to the above dismissal is hereby given.**

Dated

**When a cross-complaint (or Response (Marriage) seeking affirmative relief) is on file, the attorney(s) for the cross-complainant (respondent) must sign this consent when required by CCP 581(1), (2) or (3).

Attorney(s) for

(Type or print attorney(s) name(s))

(To be completed by clerk) JAN 25 1988

- ☐ Dismissal entered as requested on
- ☒ Dismissal entered on as to only
- ☐ Dismissal not entered as requested for the following reason(s), and attorney(s) notified on

JAN 25 1988

Dated

FRANK S. ZOLIN, Clerk

By , Deputy

Form Adopted by Rule 982 of The Judicial Council of California
Revised Effective July 1, 1972

REQUEST FOR DISMISSAL

CCP 581, etc.; Cal. Rules of Court, Rule 1233

EXHIBIT "E"

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

No. C 473190

WILLIAM BROTHERS ENGINEERING COMPANY,
an Oklahoma corporation, PLAINTIFF

v.

BOARD OF EQUALIZATION OF THE
STATE OF CALIFORNIA, DEFENDANT

PARTIAL JUDGMENT PURSUANT TO
STIPULATION

[Filed Oct. 16, 1987]

WHEREAS, plaintiff has instituted this action against defendant; and

WHEREAS, plaintiff and defendant have settled the issue presented in subparagraph H of paragraph VIII of the Complaint and have stipulated that plaintiff William Brothers Engineering Company, an Oklahoma corporation, shall have Partial Judgment against Defendant Board of Equalization of the State of California;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff William Brothers Engineering Company, an Oklahoma corporation, recover from defendant Board of Equalization of the State of California the sum of $807,308.16 plus interest on said sum to the date

of entry of Partial Judgment in the above-entitled action (which date shall be deemed to be September 1, 1987) in the sum of $996,934.05, for a total of $1,804,242.21, plus interest on said total sum pursuant to Revenue & Taxation Code § 6936, with each party to bear its own costs.

Dated: Oct. 16, 1987

/s/ John W. Dickey
JOHN W. DICKEY
Judge Pro Tem

A1-3 87 CLNT 10-26-83

Name, Address and Telephone No. of Attorney(s)

Arthur O. Armstrong, E .
Armstrong, Hirsch & Levine
1888 Century Park East, #1888
Los Angeles, CA 90067
Telephone: (213) 553-0305

Attorney(s) for Plaintiff

Space Below for Use of County Clerk Only

FILED

JAN 20 1988

FRANK S. ZOLIN, COUNTY CLERK

Anita Jones

BY ANITA JONES, DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
(SUPERIOR, MUNICIPAL, or JUSTICE)

(Name of Municipal or Justice Court District or of branch court, if any)

Plaintiff(s)

Williams Brothers Engineering Company, an Oklahoma corporation

Defendant(s)

Board of Equalization of the State of California

(Abbreviated Title)

CASE NUMBER C 473 190

REQUEST FOR DISMISSAL

TYPE OF ACTION

- ☐ Personal Injury, Property Damage and Wrongful Death
  - ☐ Motor Vehicle
  - ☐ Other
- ☐ Domestic Relations
- ☐ Eminent Domain
- ☒ Other (Specify) Refund of Taxes

TO THE CLERK. Please dismiss this action as follows: (Check applicable boxes.)

1. ☐ With prejudice ☒ Without prejudice
2. ☐ Entire action ☐ Complaint only ☐ Petition only ☐ Cross-complaint only
   ☒ Other: (Specify)*

Dismiss entire action without prejudice except for issues presented in subparagraph H of Paragraph VIII of the Complaint which were resolved and settled pursuant to Stipulation for Partial Judgment, previously filed in this action, and the Partial Judgment entered pursuant thereto.

Dated: January 19, 1988

Attorney(s) for Plaintiff

Arthur O. Armstrong.

(Type or print attorney(s) name(s))

*If dismissal requested is of specified parties only of specified causes of action only or of specified cross-complaints only, so state and identify the parties, causes of action or cross-complaints to be dismissed

TO THE CLERK. Consent to the above dismissal is hereby given.**

Dated:

Attorney(s) for

(Type or print attorney(s) name(s))

**When a cross-complaint (or Response (Marriage) seeking affirmative relief) is on file, the attorney(s) for the cross-complainant (respondent) must sign this consent when required by CCP 581(1), (2) or (5).

(To be completed by clerk)

☒ Dismissal entered as requested on JAN. 20 1988

☐ Dismissal entered on as to only

☐ Dismissal not entered as requested for the following reason(s), and attorney(s) notified on

Dated: JAN. 20 1988

FRANK S. ZOLIN, Clerk

By , Deputy

Form Adopted by Rule 982 of The Judicial Council of California, Revised Effective July 1, 1972

REQUEST FOR DISMISSAL

CCP 581, etc.; Cal. Rules of Court, Rule 1233

ORIGINAL

EXHIBIT "F"

EXHIBIT "G"

BEFORE THE
CALIFORNIA STATE BOARD
OF EQUALIZATION
1020 N Street, Room 102
Sacramento, California

REPORTER'S TRANSCRIPT

JANUARY 8, 1981

PETITION FOR REDETERMINATION

filed by

WILLIAMS BOTHERS ENGINEERING COMPANY
(SR-DHA-22-129377)

PRESENT

For the Board of Equalization:

ERNEST J. DRONENBURG, JR.
Chairman

GEORGE R. REILLY
Vice Chairman

WILLIAM M. BENNETT
Member

RICHARD NEVINS
Member

DOUGLAS D. BELL
Executive Secretary

JANICE MASTERSON
Assistant to Executive Secretary

For the Board of Equalization Staff:

DONALD J. HENNESSY
Staff Counsel

For Petitioner:

ARTHUR ARMSTRONG
Attorney at Law

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[1] MR. DRONENBURG: Okay. That brings us to Williams Brothers Engineering Company. I think we do have Mr. Arthur Armstrong representing the client. Mr. Hennessy, would you present the facts?

MR. HENNESSY: Mr. Chairman, Members of the Board, this is both a petition and a claim for refund by Williams Brothers Engineering Company which is the operator of the Elk Hills Naval Petroleum Reserve.

The main issue is whether Williams Brothers is the consumer of the materials and fixtures they used to improve the real property at the petroleum reserve at Elk Hills.

The Elk Hills Reserve is a joint operation of Standard Oil Company and the United States Navy. The Williams Brothers firm had a contract with the United States Navy, one of the duties under which was to furnish the construction and maintenance of structures and facilities at the reserve.

The land at the reserve is divided into unit land and nonunit land with unit land belonging to both Chevron and the United States Navy and they worked as a unit. The nonunit lands are strictly United States Navy lands.

Prior to October 1, 1977, Williams Brothers was paying tax reimbursement to their vendors when they purchased materials or fixtures to improve the real property.

But, after that time, on instruction or at the request of the United States Navy, they began to issue exemption

certificates on these purchases and the audit imposed use tax directly on Williams Brothers on those types of purchases.

The staff's position here is simply that pursuant to [2] Section 6384, the United States Construction Contractors statute, that Williams Brothers is the consumer of all the materials and fixtures going into the oil wells and structures and other things at this large petroleum reserve.

We do not believe that Williams Brothers was in a position as agent of the United States Government which would make these sales to the United States and therefore exempt from tax under 6381 of the R & T Code.

We do not believe there was the required agency here for two distinct reasons. The first is that although admittedly the contract does contain language to the effect that Williams Brothers is a purchasing agent, in our view, the all important element missing is that the credit of the United States Government does not run to the supply houses that are selling to Williams Brothers.

Rather, in that regard, it is a typical cost reimbursement situation. Williams Brothers would go to the supply houses, purchase the materials and fixtures, and the contract, of course, provided that there will be reimbursement by the Federal Government to Williams Brothers.

Now, under that situation, we don't believe that the magic word agency in there makes this a sale to the United States Government, that the element of federal credit is missing.

This was an important element in the United States Supreme Court case of King and Boozer in which the Alabama tax was upheld with the reason running to the fact you don't have agency unless the Federal Government's credit has run to that [3] supply house. I would also add—

MR. BENNETT: What kind of agency is it; for what purposes other than for credit and whatnot?

MR. HENNESSY: The language is simply as purchasing agent and the rest of the contract is, of course, of a cost reimbursement nature. With that language, we have a hard time actually, Mr. Bennett, pinning down what does not mean if it doesn't mean that the Federal Government is liable to the supply house. They're obviously not and frankly—

MR. BENNETT: I wonder why does the Navy procurement office place it in there then. I guess you have the same problem.

MR. HENNESSY: I have the same problem. One explanation given to us was it gave greater control over the contracting firm. Well, the contract is half an inch or so thick and there are all sorts of elements of control in there, as there are in almost all government cost reimbursement contracts, and I fail to see where these magic words of agency really add anything.

The magic word-description of this agency is something that the Tenth Circuit Court of Appeals has used in upholding the state of New Mexico in going after this same type of tax.

Now, it is not a primary authority now because there is a writ pending before the United States Supreme Court in which the United States, which lost at the Tenth Circuit on this type of agency wording, is asking the United States Supreme Court to review New Mexico's tax.

But we would submit to you the position of New Mexico [4] is very similar to the one of California. You have there a contract in which the word agent or agency or purchasing agent is in the contract and the Federal Government is relying on that to change the nature of the state tax.

MR. BENNETT: Do we have any elements here of the tax really falling upon the sovereign—

MR. HENNESSY: Upon whom?

MR. BENNETT: —Diamond National? Is there any effect such as that here?

MR. HENNESSY: That argument has been made. We do not believe that's the effect because of the lack of a sale to the United States Government. We would see the primary tax here, of course, would be a sales tax on the supply house. But given the exemption certificates, it would then become a use tax on Williams Brothers.

Now, we see that as still one step short of hitting the Federal Government. We would very much see it as an Alabama and King and Boozer-type case which has long been the prime case upholding the state tax in this area.

The second reason we don't believe there is an agency here is one that goes to a policy announced by the Department of Defense in 1955 and it was reaffirmed to this Board in a letter to Mr. Bennett when he was Chairman of the Board in 1976 reaffirming that policy not to designate Department of Defense contractors as agents of the Federal Government.

Now, we have received a letter from the Department of Defense saying that, well, the petroleum reserve was unique. It was a different situation than most situations. [5] Well, this explanation leaves us still with the fact that the Naval Petroleum Reserve was within the purview of the Secretary of the Navy. The United States Code states that the Secretary of the Navy shall administer the reserve under the authority of the Department of Defense. We believe that policy runs through.

Talk of uniqueness frankly has not convinced us that this is anything other than a situation that the Department of Defense told the federal congress in 1955 they would not use an agency clause to avoid state taxes. That is an additional reason why we do not believe this is an invalid type of state tax.

There is a title provision herein which supposedly title to the material and fixtures would run directly to the United States Government. That was also present in the

King and Boozer case when it came before the United States Supreme Court and the court said that regardless of that title provision the contractor is the purchaser.

He's the one liable to the supply house for the charge for the items purchased. Thereore that title provision does not avoid the state tax. We would submit King and Boozer again as authority on that title provision.

MR. BENNETT: Aside from the tax question, is it conceded that title does pass at once to the sovereign?

MR. HENNESSY: I think we concede the title clause is effective in the same sense it was in this King and Boozer situation.

MR. BENNETT: Does that mean that he goes to the [6] supply house and purchases it and that is the property of the United States of America?

MR. HENNESSY: It is under the contract as of the time the federal contractor inspects and approves it, yes. This was a big point in the United States attacking the Alabama tax. They felt this was quite conclusive. The United States Supreme Court didn't. They looked again to who is the purchaser.

MR. BENNETT: Again, this is just thinking aloud. But here he's a designated agent. We say title passes at once on the United States property. The tax is imposed.

MR. NEVINS: Well, he didn't complete his contract with the Federal Government until he actually installed this property into the realty, isn't that right?

MR. HENNESSY: I would agree with that, yes. Absolutely.

MR. BENNETT: That could be so. But you are telling me that regardless of when completed, title passed at the store, the supply house.

MR. HENNESSY: The contract has that provision.

MR. BENNETT: I mean that's what I asked. I said do we concede the contract provision is operative and it does pass title at the supply house.

MR. HENNESSY: I would agree, Mr. Bennett, yes.

MR. BENNETT: Doesn't that make this somewhat more difficult then for us?

MR. HENNESSY: It surely would prior to the King and Boozer case being decided.

MR. BENNETT: Is that King and Boozer case, is that [7] dicta or language on the merits of the case?

MR. HENNESSY: It is language on the merits of the case. In fact, the United States Government was very much pinning their hopes on the very kind of reasoning you are using there when they went before the United States Supreme Court.

The only two further points I would mention are that in the reaudit, there has been a sizable measure allowed to go free of the tax because certain pumps, expensive pumps at the petroleum reserve, were found to be on skids.

They were, in fact, moved quite often according to our auditor. Those have been allowed as machinery and equipment resold to the Federal Government.

My last point would be that the claim for refund here deals with the tax reimbursement paid to the supply houses prior to October 1, '76, when the Navy asked for the change.

The staff's position would be regardless of what happened to the rest of the case that that tax is not refundable directly to the United States Government but would have to come through claims for refund from the vendors who paid the tax to this Board, there being no provision in the administrative process itself for direct refund to the United States Government.

That is basically your staff's position. Mr. Armstrong is here this morning to present the position of Williams Brothers.

MR. DRONENBURG: Mr. Armstrong.

MR. ARMSTRONG: My name is Arthur Armstrong, attorney for Williams Brothers. I'm appearing here at

the direction of [8] the United States Government for Williams Brothers to—

MR. BENNETT: Pardon me. Do you have specific authority to represent the United States of America?

MR. ARMSTRONG: I do not represent the United States of America. I represent Williams Brothers Engineering Company which is instructed as to the steps it's to take but I don't report to the United States Government.

MR. BENNETT: You don't speak for the government?

MR. ARMSTRONG: No, sir, I do not.

MR. BENNETT: Neither do they except for state government.

MR. ARMSTRONG: I speak for neither.

MR. BENNETT: Okay.

MR. ARMSTRONG: If the Board doesn't object, I'll remain seated. I have a back that prefers that posture.

MR. DRONENBURG: Fine.

MR. ARMSTRONG: It also allows me to consult my notes. The basis of this case is set forth in an appallingly thick document that we submitted to Mr. Hennessy sometime back. It's part of the permanent file. Much of the thickness is a series of exhibits and the bulk of the presentation consists of about a 23 page preliminary statement.

I will not repeat those materials nor the other materials in the file. I believe that Mr. Hennessy's various write-ups of this matter have generally been evenhanded except with respect to his conclusions with which we disagree. But I think the factual statements have generally —the written factual statements have generally been acceptable to us.

[9] I would like to make a brief presentation here to acquaint you with the issues as we see them and then Mr. Hennessy and I have discussed the possibility of a supplemental presentation to the Board that will help

sharpen the legal issues in the light of your questions and in light of some concerns that I've expressed to him.

The facts as set forth very briefly are that Williams Brothers Engineering Company has been operating the Elk Hills Petroleum Reserve since 1975 first under the agis of the Secretary of the Navy and since 1977, the latter part of 1977, under the Department of Energy which now has authority over the reserve.

The tax that's here involved was assessed against W.B.E.C. under the authority of Section 6384 of the Revenue and Taxation Code which is a modification of the general rule that sales tax does not apply on sales to the United States Government. That section purports to tax sales to contractors who are purchasing either on their own account or as agents of the United States.

If the items are used in the performance of a contract for the construction of improvements on real property as set forth in our prior statement and in the submission to Mr. Hennessy, we believe that the tax here involved doesn't apply for several reasons, some of which involve construction of the statute and some of which involve constitutionality questions to which Mr. Hennessy and Mr. Bennett were directing most of their attention.

We initially do not—W.B.E.C., as the contract [10] states, and as Mr. Hennessy indicated, contains a clause that when W.B.E.C. purchased under the contract it was purchasing as purchasing agents for the United States Government.

Each of the contracts contain a clause under which procurements are made, contain a clause that the procurement is made on the behalf of, and for the benefit of, the United States Government. Title does pass, as Mr. Hennessy concurred, directly from the vendor to the United States Government. W.B.E.C. never holds title.

I am not authorized to make any statements of law as to the legal liability of the United States Government for procurement under these circumstances. I wish that I

could establish right out that there is no question but that the United States Navy is on the hook.

I can't make that statement. I haven't been authorized to do so. I think it's a question of law that could only be resolved in an action by an unpaid vendor against the United States Government. My understanding is that the government has suffered to some extent from overgenerous commitments of its resources.

MR. BENNETT: As you state the facts, and very well, it seems to me there is a burden on the United States Navy here. Maybe it's a permissible burden. I'm surprised at the result of the case to which Mr. Hennessy referred.

But I would think they might even be here. I guess they don't deign to submit to state jurisdiction. That's why they're not here.

MR. ARMSTRONG: I can't answer that. But I do [11] regard—

MR. BENNETT: We're taxing really the United States property, at least it's the measure of tax. The tax is on you. That's the theory, the reality. Perhaps the—

MR. ARMSTRONG: There is no question that the burden of the tax falls on the United States Government. That's not even an issue. Nobody argues that.

MR. BENNETT: Why isn't this under Diamond National?

MR. ARMSTRONG: That's one of the questions that we regard as directly pertinent.

MR. BENNETT:If a bank can get it—they're usually privately held in this society—it seems to me the—well, anyway, that's my observation.

MR. NEVINS: May I ask a question? Isn't this a device the Navy is using to try to improve their budgetary situation? Isn't that what this is really all about?

MR. ARMSTRONG: I obviously can't answer that since I wasn't present at the birth of the contract. In this particular instance, however, the relationship of

W.B.E.C. to the Elk Hills Reserve is quite different from that of the construction contractor for the United States Government. Ours is purely an administrative role in which—

MR. NEVINS: If the Navy doesn't have to reimburse you for taxes paid to the State of California then either they get more revenue from the oil field or they get less expenditure on their budget. In other words, they can use it for something else. That's really what this boils down to, itsn't it?

MR. ARMSTRONG: Again, I honestly don't know, sir. I [12] do know the contract provisions are regarding the authority of the W.B.E.C. and the nature in which it procures were the subject of intense negotiation and are regarded by the Navy as having substantitve impact over and above the sales tax and, in fact, were negotiated prior to the time of the Diamond National case to which Mr. Bennett referred and without specific reference to that.

They were in the contract before the tax question arose. So I don't think it can fairly be said that the purpose of the clause was a tax purpose. I think it was a business substantive purpose.

MR. NEVINS: The business substantive purpose is to reduce the cost to the Navy.

MR. ARMSTRONG: I don't believe so. As I indicated, at the time the contract was negotiated, for the first approximately three months, as I recall, of activity under the contract, the United States Government authorized W.B.E.C. to reimburse its vendors for the sales tax.

It was not until the Diamond National decision that that policy was reconsidered. So that at the time the contract was negotiated, for whatever reason, the authorities had not taken the position that the sales tax did not apply.

In retrospect, if I were making the decision for them in 1975, as evidenced by the fact we filed a claim for refund, I would disagree with that conclusion. But it's clear they did not have a tax saving motive in mind at the time they drew the contract.

MR. NEVINS: In Diamond National, didn't the banks [13] have a specific statutory relationship to the state that is not present here?

MR. ARMSTRONG: I don't believe the banks have a specific relationship to the state.

MR. NEVINS: Wasn't this statute based, in roughly 1876 or somewhere along in there, that defined very clearly where the banks stood as federal entities?

MR. ARMSTRONG: Well, I think that's true. I don't think anybody's ever questioned where the United States Government stands as a federal entity.

MR. NEVINS: It made these banks a part of the federal apparatus.

MR. ARMSTRONG: In a sense, that's correct. I guess

MR. NEVINS: There is no—your client is not a part of the federal entity. It doesn't have statutory protetcion saying that, well, he's free of taxes because he's delivering mail for me and therefore he can't pay any state or local taxes or some such gimmick as that. There is no such thing as that.

MR. ARMSTRONG: No. You are correct. There is no statute that says a government contractor is exempt from state sales taxes. That is absolutely correct. the issue—

MR. NEVINS: There was one in respect to banks, wasn't there?

MR. ARMSTRONG: Yes, sir. That's correct. The issue in this case is whether W.B.E.C. in its relationship to the United States Government is an independent, taxable entity or whether the tax is, in fact, on the United States.

[14] MR. ARMSTRONG: That's the issue.

MR. NEVINS: The Department of Defense reiterating it in a letter to Mr. Bennett, has said they're going to pay this kind of tax. Isn't that the sense of what the policy is?

MR. ARMSTRONG: There was a policy statement in 1955 to which continuous reference has been made throughout my presentations. I think the only thing I can say in that regard is that the Department of Defense has provided Mr. Hennessy with a letter explaining why the contract refers to us as agent.

Let me concede with you for a moment the Department of Defense or that the—pardon me—the Secretary of the Navy in this contract deviated from that policy. I don't believe they did because their position is that the policy didn't apply to the unusual relationship of the Elk Hills Petroleum Reserve to the government.

The Navy creates an argument, the merits of which I won't go into with you, that it's a unique situation because of its genesis and that's outlined in the presentation he made.

MR. NEVINS: They don't have statutory support for that. That's the critical point.

MR. ARMSTRONG: They claim they do, that the statute creates the Elk Hills Reserve as a different kind of entity than the customary defense establishment. Their position is that it's a unique relationship that is administered by the Secretary of the Navy for Congress. It is not part of D.O.D. as such.

MR. NEVINS: Does the statute you are referring to does that make contractors to the Navy here have some different [15] place then they would be if they were building ships or building a naval airstation in the San Joaquin Valley?

MR. ARMSTRONG: That's the position the Navy has expressed to Mr. Hennesy in the letter of January 10, as I recall.

MR. HENNESSY: January 22.

MR. ARMSTRONG: On January 22, they took that position. What I would say is this, sir, that the Secretary of the Navy executed the contract in 1975. It was approved by President Ford.

I don't know what it takes to countermand or override a policy statement in 1955 but to the extent it can be done they did it. Mr. Hennessy's position has been that the clause is void because of the policy statement.

I don't accept that. I don't—the contract exists. A contreact creates a legal relationship. It says it's an agency relationship as Mr. Bennett and I were discussing.

MR. BENNETT: How could a policy statement interfere with a vested contract right unless both parties to the contract agree?

MR. ARMSTRONG: I concur with you on that. That's our position, that it may well be that whoever executed this contract should be admonished for not having followed the statement.

MR. BENNETT: Policy as a word isn't binding on anybody. It might be policy of a society or government, you know, to punish people that wear brown hats. Unless there is a statute, it's just ineffective policy.

[16] MR. ARMSTRONG: That's our position.

MR. NEVINS: The Secretary of the Navy had this glorious disease of ultra vires. In any event, he still had King and Boozer. He couldn't override King and Boozer—

MR. ARMSTRONG: Obviously he cannot.

MR. NEVINS: —without a statute.

MR. ARMSTRONG: It would take at least a statute, yes. A statute would be sufficient to override King and Boozer.

MR. NEVINS: And there is none that we're aware of.

MR. ARMSTRONG: No, sir. That's correct. There is no statute excluding or making it improper for the state to tax WBEC as in the case of a bank. The question is

whether the tax is, in fact, one on the United States and that is our position.

If I can just go forward, having breached my reputation of conciseness to Mr. Droneburg, one of the elements of the operations at Elk Hills is that W.B.E.C. functions in as broad or as narrow a capacity as the Department of Energy now, the Department of Defense Secretary of the Navy previously, directs.

In some instances, we just purchased goods that are, in fact, installed, and demonstrably installed, by other persons or by the Navy itself. Some of the construction was actually performed by the Navy.

MR. NEVINS: Our records show we didn't tax any of that if it was performed by the Navy tiself.

MR. ARMSTRONG: Mr. Hennessy and I have agreed —his recommendation has been that should not be taxed. I have undertaken to—I believe that we may have failed to provide [17] him with a full data on the exact amount of that.

I'm going to supplement his records with that information. We have agreed that where we are functioning only as a purchasing agent or procurement function that the tax doesn't apply.

There is, on the other end of the spectrum, in some instances, a drilling activity or other activities are being peroformed under the administration of W.B.E.C. and procurements are used in connection with those activities.

It's been our position that even where there is that coincidence that our activity as purchasing agent is separable from our activity as a supervisor of installations. Mr. Hennessy disagreed on that and I accept that and that's the basis of the assessment. Our legal position is, however, that even though our functions are discreet under the contract, there is a middle group of procurement which involves materials that go to warehouses which are to be held and used in subsequent drilling and other activities on the reserve.

Mr. Hennessy's position has been that in those cases as well primarily, as I understand our conversation, because there is high probability they'll be installed under our aegis, that the tax should apply, rather than excluding those on the same basis as the Navy installation situation are excluded.

We believe that in those cases where the procurement is for a warehouse, they are comparable to procurement direct for Navy installation because our actual use of the goods in installation is happenstance and depends on renewal of the contract and so forth. That I think is spelled out in our [18] presentation.

I think, if you will, I will eliminate the statutory construction problem under Section 6384 because Section 6384 only imposes tax if the personal property is purchased by us as a construction contractor.

Our position is that when we are doing these other procurements we're not acting as a construction contractor but as a mere procurement officer.

The other position we have taken and that we believe invalidates the tax is based on the Lockheed decision and then the fact we do not have title to the goods.

Our position is we cannot be subjected to use tax on property that we don't own which is the basis of a substantial portion of the assessment.

MR. NEVINS: You use it, right?

MR. ARMSTRONG: Pardon?

MR. NEVINS: You use it, right?

MR. ARMSTRONG: I guess that sort of states the issue. Some of this equipment that goes into the warehouses—

MR. NEVINS: That's equipment. Let's talk about materials used in the real property.

MR. ARMSTRONG: Fine.

MR. NEVINS: The improvements to real property.

MR. ARMSTRONG: Those are employed by subcontractors in the performance of tasks assigned by the

United States Navy. We have entered into the subcontract. We do not believe we use that equipment, certainly no more so than Lockheed did in its procurements.

[19] That is the government's own material. That is being put into the ground under our administrative supervision. We do not have responsibility for the well.

We have responsibility if we are negligent in our administration or supervision of the drilling but we do not have liability if an act of God, for instance, occurs. That isn't our well. That's the government's well from beginning to end. It is never our well. It is never our equipment.

Our responsibility is that of an admininstrator with no direct liability or responsibility for the materials. So I do not believe that we use that equipment in any sense and certainly we do not have legal title to it.

The final issue that's raised, and was referred to by Mr. Hennessy, I have belabored to some extent already which goes to the position that we are an agent for the United States Government.

To the extent that the statute permits imposition of the tax within this context, we believe that the tax does impermissibly fall on the United States Government, that it is the parties to whom the goods are sold, and that the tax cannot be imposed on the government through an assessment against W.B.E.C.

MR. DRONENBURG: You say Uncle Sam owes the tax.

MR. ARMSTRONG: This is an extraordinarily complex case. It involves an absolutely bewildering array of subissues. I spoke to Mr. Dronenburg before my presentation and I have, as I indicated, made a rather extensive, more or less factual, presentation previously.

[20] I would appreciate the permission of the Board to try to submit a brief that perhaps sharpens these legal issues in the light of the conversations we've had here.

MR. BENNETT: How much time do you want?

MR. ARMSTRONG: I should be able to do that within 30 days.

MR. BENNETT: I so move.

MR. NEVINS: Second.

MR. DRONENBURG: Well, is there a motion to take it under consideration.

MR. NEVINS: That's the motion. I seconded Mr. Bennett's motion.

MR. DRONENBURG: The motion is to—

MR. BENNETT: Is that all, counsel?

MR. ARMSTRONG: That's all I have, sir. I don't believe I can really be helpful by—

MR. BENNETT: What about this? You say you are an agent but you are not an agent for the critical function here to wit, you know, on the credit issue.

MR. ARMSTRONG: I didn't say that, sir. I only said—

MR. BENNETT: Mr. Hennessy said it.

MR. ARMSTRONG: He said that, sure. That I believe is an issue of law that would be decided in light of the contract provisions and of the procurements which are —the forms of which are directed by the responsible government agency, now the DOE. They say the procurement is made on behalf of and for the benefit of the agency.

MR. BENNETT: Is it in the practice or the custom of [21] the supplier to know that the government is the guarantor of these things ultimately?

MR. ARMSTRONG: I can't use the word "guarantor".

MR. BENNETT: That's a loose word. That it stands behind you. That they'll pay if you don't.

MR. ARMSTRONG: I'm not authorized to make a statement on that.

MR. BENNETT: No. Not for the government. Is that as you perceive?

MR. ARMSTRONG: Let me put it this way. If I were a vendor and Williams Brothers went broke, certainly one of the defendants that would come to mind would be the United States Government. There is just no question about that.

MR. BENNETT: On that word agent?

MR. ARMSTRONG: Yes.

MR. BENNETT: Is that all? Just that word agent?

MR. ARMSTRONG: No. Heavens no. On the basis of the provisions in the procurement that say it's made on the behalf of and for the benefit of the United States Government. That's what's in each procurement.

MR. BENNETT: What's in the documents running from you to the supplier?

MR. ARMSTRONG: That's the language I was just using, sir.

MR. BENNETT: Oh. Is that in the file, that document?

MR. ARMSTRONG: Yes, sir. If it isn't, I will find it for you and point it out.

MR. BENNETT: You know, the government purchasing [22] officer is rather meticulous in issuing these things and to whom they extend credit and so on and so forth. It seems to me if they had obligated themselves to the supplier, it would be easy to read where they had done that.

MR. ARMSTRONG: As far as I know, I'm unaware of a case that involves—

MR. BENNETT: I mean right in the document itself because these things are reviewed by large, bureaucratic systems which finally approve it after everybody else does all the work.

MR. ARMSTRONG: Yes, sir. But I would guess as a matter of policy if I were the United States Government, I would not want to concede to you or anybody before the trial that I was liable on these agreements.

MR. DRONENBURG: Okay. We have a motion to take this under consideration—

MR. BENNETT: I so move.

MR. DRONENBURG: —and to allow 30 days for a supplemental brief from Mr. Armstrong. It's been seconded. Hearing no objection, that will be the order. Thank you, Mr. Armstrong.

MR. ARMSTRONG: Thank you for your attention.

EXHIBIT "H"

Article 2. Contractors and Subcontractors

1521. Construction Contractors.

(a) Definitions:

(1) Construction Contract.

(A) "Construction contract" means and includes a contract, whether on a lump sum, time and material, cost plus, or other basis, to:

1. Erect, construct, alter, or repair any building or other structure, project, development, or other improvement on or to real property, or

2. Erect, construct, alter, or repair any fixed works such as waterways and hydroelectric plants, steam and atomic electric generating plants, electrical transmission and distribution lines, telephone and telegraph lines, railroads, highways, airports, sewers and sewage disposal plants and systems, waterworks and water distirbution systems, gas transmission and distribution systems, pipelines and other systems for the transmission of petroleum and other liquid or gaseous substances, refiners and chemical plants, or

3. Pave surfaces separately or in connection with any of the above works or projects, or

4. Furnish and install the property becoming a part of a central heating, air-conditioning, or electrical system of a building or other structure, and furnish and install wires, ducts, pipes, vents, and other conduit imbedded in or securely affixed to th eland or a structure thereon.

(B) "Construction contract" does not include:

1. A contract for the sale or for the sale and installation of tangible personal property such as machinery and equipment, or

2. The furnishing of tangible personal property under what is otherwise a construction contract if the person

furnishing the property is not responsible under the construction contract for the final affixation or installation of the property furnished.

(2) Construction Contractor. "Construction contractor" means any person who for himself, in conjunction with, or by or through others, agrees to perform and does perform a construction contract. "Construction contractor" includes subcontractors and specialty contractors and those engaged in such building trades as carpentry, bricklaying, cement work, steel work, plastering, drywall installation, sheet metal work, roofing, tile and terrazzo work, electrical work, plumbing, heating, air-conditioning, elevator installation and construction, painting, and persons, installing floor coverings, including linoleum, floor tile, and wall-to-wall carpeting, by permanently affixing such coverings to a floor.

(3) United States Construction Contractor. "United States construction contractor" means a construction contractor who for himself, in conjunction with, or by or through others, agrees to perform and does perform a construction contract for the United States Government.

(4) Materials. "Materials" means and includes construction materials and components, and other tangible personal property incorporated into, attached to, or affixed to, real property by contractors in the performance of a construction contract and which, when combined with other tangible personal property, losses its identity to become an integral and inseparable part of the real property. A list of typical items regarded as materials is set forth in Appendix A.

(5) Fixtures. "Fixtures" means and includes items which are accessory to a building or other structure and do not lose their identity as accessories when installed. A list of typical items regarded as fixtures is set forth in Appendix B.

(6) Machinery and Equipment. "Machinery and equipment" means and includes property intended to be used

in the production, manufacturing or processing of tangible personal property, the performance of services or for other purposes (e.g., research, testing, experimentation) not essential to the fixed works, building, or structure itself, but which property incidentally may, on account of its nature, be attached to the realty without losing its identity as a particular piece of machinery or equipment and, if attached, is readily removable without damage to the unit or to the realty. "Machinery and equipment" does not include junction boxes, switches, conduit and wiring, or valves, pipes, and tubing incorporated into fixed works, buildings, or other structures, whether or not such items are used solely or partially in connection with the operation of machinery and equipment, nor does it include items of tangible personal property such as power shovels, cranes, trucks, and hand or power tools used to perform the construction contract. A list of typical items regarded as machinery and equipment together with a list of typical items not regarded as machinery and equipment is set forth in Appendix C.

(7) Time and Material Contract. "Time and material contract" means a contract under which the contractor agrees to furnish and install materials or fixtures, or both, and which sets forth separately a charge for the materials or fixtures and a charge for their installation or fabrication.

(8) Lump Sum Contract. "Lump sum contract" means a contract under which the contractor for a stated lump sum agrees to furnish and install materials or fixtures, or both. A lump sum contract does not become a time and material contract when the amounts attributable to materials, fixtures, labor, or tax are separately, stated in the invoice.

(b) Application of Tax.

(1) United States Construction Contractors.

(A) Materials and Fixtures. United States construction contractors are consumers of materials and fixtures which they furnish and install in the performance of

contracts with the United States Government. Either the sales tax or the use tax applies with respect to sales of tangible personal property (including materials, fixtures, supplies, and equipment) to contractors for use in the performance of such contracts with the United States for the construction of improvements on or to real property in this state. The fact that the contract may provide principally for the manufacture or acquisition of tangible personal property is immaterial. The sales tax, but not the use tax, applies even though the contractor purchases the property as the agent of the United States.

(B) Machinery and Equipment. United States contractors are retailers of machinery and equipment furnished in connection with the performance of a construction contract with the United States Government. Tax does not apply to sales of machinery and equipment to United States contractors or subcontractors, provided title to the property passes to the United States before the contractor makes any use of it. Such sales are sales for resale, and the purchasing contractor may issue a resale certificate. A contractor who uses the machinery or equipment before title passes to the United States is the consumer of that machinery or equipment and either sales tax or use tax applies with respect to the sale to or the use by the contractor.

(2) Construction Contractors Other than United States Construction Contractors.

(A) Materials.

1. In General. Construction contractors are consumers of materials which they furnish and install in the performance of construction contracts. Either sales tax or use tax applies with respect to the sale of the materials to or the use of the materials by the construction contractor.

2. When Contractor is Seller. A construction contractor may contract to sell materials and also to install the materials sold. If the contract explicitly provides

for the transfer of title to the materials prior to the time the materials are installed, and separately states the sale price of the materials, exclusive of the charge for installation, the contractor will be deemed to be the retailer of the materials.

In the case of a time and material contract, if the contractor bills his customer an amount for "sales tax" computed upon his marked up billing for materials, it will be assumed, in the absence of convincing evidence to the contrary, that he is the retailer of the materials.

If the sale occurs in this state, the sales tax applies to the contractor's (retailer's) gross receipts from the sale of the materials. If the sale occurs prior to the time the property is brought into this state, the contractor's (retailer's) customer is the consumer and his use (unless otherwise exempt) is subject to use tax measured by the sales price. The contractor must collect the use tax and pay it to this state.

(B) Fixtures.

1. In General. Construction contractors are retailers of fixtures which they furnish and install in the performance of construction contracts and tax applies to their sales of the fixtures.

2. Measure of Tax.

a. In General. If the contract states the sale price at which the fixture is sold, tax applies to that price. If the contract does not state the sale price of the fixture, the sale price shall be deemed to be the cost price of the fixture to the contractor.

b. Determining Cost Price. If the contractor purchases the fixtures in a completed condition, the cost price is deemed to be the sale price of the fixture to him and shall include any manufacturer's excise tax or import duty imposed with respect to the fixture prior to its sale by the contractor.

If the contractor is the manufacturer of the fixture, the cost price is deemed to the price at which similar

fixtures in similar quantities ready for installation are sold by him to other contractors.

If similar fixtures are not sold to other contractors ready for installation, then the cost price shall be deemed to be the amount stated in the price lists, bid sheets or other records of the contractor.

If the sale price cannot be established in the above manner and the fixture is manufactured by the contractor, the cost price shall be deemed to be the aggregate of the following:

[1] Cost of materials, including such items as freight-in and import duties,

[2] Direct labor, including fringe benefits and payroll taxes,

[3] Specific factory costs attributable to the fixture,

[4] Any manufacturer's excise tax,

[5] Pro rata share of all overhead attributable to the manufacture of the fixture, and

[6] Reasonable profit from the manufacturing operations, which, in the absence of evidence to the contrary, shall be deemed to be 5 percent of the sum of the preceding factors.

Jobsite fabrication labor and its prorated share of manufacturing overhead must be included in the sale price of the fixture. Jobsite fabrication labor includes assembly labor performed prior to attachment of a component or a fixture to a structure or other real property.

3. Exceptions—Leased Fixtures. In some instances the construction contractor may furnish and install a fixture for a person, other than the owner of the realty, who intends to lease the fixture in place as tangible personal property as provided in Section 6016.3 of the Revenue and Taxation Code and pay tax measured by rental receipts.

In this case the construction contractor may take a resale certificate from the lessor at the time of the transaction and the sale to the lessor will be considered to be a

sale for resale. The resale certificate should indicate that the fixture is purchased for reseal by the purchaser as tangible property under Section 6016.3 of the Revenue and Taxation Code.

(C) Machinery and Equipment.

1. In General. Construction contractors are retailers of machinery and equipment even though the machinery and equipment is furnished in connection with a construction contract. Tax applies to the contractor's gross receipts from such sales.

2. Measure of Tax.

a. In General. Tax applies to the gross receipts from the sale of machinery and equipment furnished and installed by a construction contractor. If the contract calls only for the furnishing and installation of machinery and equipment, tax applies to the total contract price less those charges excludible from gross receipts under Section 6012 of the Revenue and Taxation Code.

b. Lump Sum Contracts—Determining Gross Receipts. If the contract is for a lump sum and includes the furnishing and installation of materials, fixtures, and machinery and equipment, the gross receipts from the sale of the machinery and equipment shall be the price at which similar quantities ready for installation are sold at retail and delivered in the market area where the installation takes place.

If there is no such retail price for the machinery and equipment, then the gross receipts shall be determined from the contracts, price lists, bid sheets, or other records of the contractor.

If the gross receipts cannot be established in the above manner and the machinery and equipment is manufactured by the contractor, the gross receipts from the sale shall be the aggregate of the following:

[1] Cost of materials, including such items as freight-in and import duties,

[2] Direct labor, including fringe benefits and payroll taxes.

[3] Specific factory costs attributable to the machinery or equipment,

[4] Any manufacture's excise tax,

[5] Pro rata share of all overhead attributable to the machinery or equipment, including overhead attributable to manufacturing, selling, contracting, and administration, and

[6] Reasonable profit from the manufacture and sale of the machinery or equipment which, in the absence of evidence to the contrary, shall be deemed to be 5 percent of the sum of the preceding factors.

Jobsite fabrication labor and its prorated share of manufacturing overhead must be included in the sale price of the machinery or equipment. Jobsite fabrication labor includes assembly labor performed prior to attachment of a component or the machinery or equipment to a structure or other real property.

(D) Cost Plus A Fee Contracts. When a contractor enters into a construction contract for a cost plus a fee or time and materials plus a fee, whether the fee is a lump sum or a percentage of costs, the fee is not included in the measure of tax. When the contractor is the manufacturer of the fixtures or machinery and equipment, the "cost price" of the fixtures and the gross receipts from the sale of the machinery and equipment shall be determined in accordance with (B) and (C) above.

(3) Miscellaneous Sales by Contractors. In addition to sales of fixtures and machinery and equipment, tax applies to all retail sales by contractors of tangible personal property, including parts, supplies, tools, contsruction equipment, buildings severed or to be severed by the contractor, and furniture, including furniture sold with a building, even though the building is sold "in place."

(4) Permits. Contractors engaged solely in performing construction contracts which do not involve the sale and

installation of fixtures and who do not also engage in business as sellers or retailers are not required to hold seller's permits. However, if a contractor is a seller or retailer because he makes sales of fixtures, materials, or machinery and equipment, or other tangible personal property either in connection with or as part of a construction contract, or otherwise, he is required to hold a seller's permit.

(5) Supplies and Tools for Self-Use. Contractors are the consumers of supplies such as oxygen, acetylene, gasoline, acid, thread-cutting oil, and tools and parts for tools, which they use in their business, and the tax applies to the sale of such supplies and tools to contractors.

(6) Exemption Certificates.

(A) Resale Certificates. Contractors holding valid seller's permits may purchase fixtures and machinery and equipment for resale by issuing resale certificates to their suppliers. They may not purchase materials for resale unless they are also in the business of selling materials.

A contractor cannot avoid liability for sales or use tax on materials or fixtures furnished and installed by him by taking a resale certificate from the prime contractor, interior decorators, designers, department stores, or others. However, under the circumstances described in subsection (b)(2)(B)3., a contractor may take a resale certificate for fixtures furnished and installed by him for a person other than the owner of the realty.

(B) Exemption Certificates for Out-of-State Use. Sales tax does not apply to sales of tangible personal property to a construction contractor who holds a valid California seller's permit when the property is used by the contractor outside this state in his performance of a contract to improve real property and as a result of such use the property is incorporated into and becomes a part of real property located outside this state. This exemption is available only if at the time of the purchase the contractor certifies in writing to the seller that he holds a valid

California seller's permit (giving the number of that states that the property will be used in the manner stated above. The certificate must be signed by the contractor or an authorized employee. Such a certification may appear in the body of a purchase order which bears the signature of the purchaser. Any certificate given subsequent to the time of purchase will not be recognized.

If the property purchased under a certificate is used by the contractor in any other manner or for any other purpose than stated in the certificate, the contractor shall be liable for sales tax as if he were a retailer making a retail sale of the property at the time of such use, and the sale price of the property to him shall be deemed the gross receipts from the sale.

(C) Deductions for Tax-Paid Purchases Resold. A contractor may claim a "tax-paid purchases resold" deduction for any property of which he is the retailer when he has reimbursed his vendor for tax which the vendor is required to pay to the State or has paid the use tax with respect to the property, and has resold the property prior to making any use of it. In the event that the contractor sells short ends or pieces which are not used other than in severing them from larger units purchased by him and as to which he has paid sales tax reimbursement or use tax, he may claim the deduction for tax-paid purchases resold, but the amount of the deduction shall not exceed the price at which he sells such short ends or pieces.

(c) Particular Applications.

(1) Draperies and Drapery Hardware. Persons who contract to sell and install draperies including drapery hardware, such as brackets, rods, tracks, etc., are retailers of the items which they furnish and install. Tax applies to the entire contract price exclusive of the charge for installation which charge should be separately stated. Installers who furnish drapery hardware or other tangible personal property may accept resale certificates from department stores or other sellers to furnish and install the draperies and drapery hardware.

The department stores or other sellers furnishing resale certificates are required to pay the tax to the state upon their selling price of the draperies and drapery hardware, exclusive of installation charges. The installer should segregate his installation charge in order that the department store or other seller may properly segregate its charge attributable to installation for purposes of determining its taxable gross receipts.

(2) Prefabricated Cabinets. A cabinet will be considered to be "prefabricated" and a "fixture" when 90 percent of the total direct cost of labor and material in fabricating and installing the cabinet is incurred prior to affixation to the realty. In determining this 90 percent, the total direct cost of all labor and materials in fabricating the cabinet to the point of installation will be compared to the total direct cost of all labor and materials in completely fabricating and installing the cabinet. If more than one cabinet is fabricated and installed under the contract, each cabinet will be considered separately in determining whether the cabinet is prefabricated.

(3) Prefabricated Buildings. Prefabricated units such as commercial coaches, house trailers, etc., registered with the Department of Motor Vehicles or the Department of Housing and Community Development, are tangible personal property even though they may be connected to plumbing and utilities. A mobilehome which meets or is modified to meet all applicable building codes and regulations and which is permanently affixed to realty is an improvement to realty and is not personal property. Generally portable buildings which merely rest on redwood sills, piers or like property and are attached to realty only through plumbing and utility hookups are personal property.

Prefabricated and modular buildings, other than the type described above, affixed to the realty in a manner indicating that they are intended to remain permanenty or indefinitely in place are improvements to realty for the

purposes of this regulation. It is immaterial whether the buildings are erected upon or affixed to land owned by the owner of the building or are leased to the landowner or lessee of the land.

Prefabricated or modular buildings which are "factory-built housing" where permanently affixed to the realty are improvements to realty. The manufacturer of factory-built housing who contracts to furnish and install the factory-built housing manufactured by him is the consumer of the materials used in building and installing the factory-built housing and the retailer of the fixtures. Tax applies as provided in (b) above.

(4) Mobilehomes Installed for Occupancy as Residences.

Operative July 1, 1980, a special measure of sales or use tax is provided for a mobilehome sold to be affixed to realty for occupancy as a residence.

A mobilehome dealer who sells a new mobilehome to a construction contractor to be affixed to land for occupancy as a residence is the "retailer-consumer" of the property and is required to pay tax for the period in which the sale was made by the dealer measured by an amount equal to 75 percent of the retailer-consumer's purchase price of the mobilehome.

A construction contractor who withdraws a new mobilehome from an inventory purchased for resale to be affixed to realty for occupancy as a residence in the performance of a construction contract is required to pay tax measured by 75 percent of the purchase price by his mobilehome vendor except where the purchase is made directly from a mobilehome manufacturer. In the absence of satisfactory evidence of the vendor's purchase price it shall be presumed that the measure of tax for the transaction is an amount equivalent to 60 percent of the sales price of the mobilehome to the construction contractor.

A mobilehome manufacturer who sells a new mobilehome directly to a construction contractor for installation to real property for occupancy as a residence is required

to pay tax measured by 75 percent of the sales price at which a similar mobilehome ready for installation would be sold by the manufacturer to a retailer-consumer in this state. A construction contractor who withdraws a new mobilehome from an inventory purchased from a manufacturer for resale must pay tax measured by 75 percent of his purchase price.

A mobilehome manufacturer who performs a construction contract by permanently affixing a new mobilehome to real property is the consumer of the material and the retailer of fixtures installed by him and the tax applies as set forth in paragraph (b) above.

Reference should also be made to the provisions of Regulation 1610.2 for additional interpretative rules relating to custom additions to the mobilehome prior to sale, transfers of nonvehicle items, and the application of the tax to a purchase made from an out-of-state retailer.

(5) Repair Contracts. Contracts to repair fixtures are contracts for the sale and installation of parts when the sales price of the parts is billed separately from the repair labor. Tax applies to the sale price of the parts.

A contractor who enters into a lump sum contract to repair a fixture in place or a fixture he is required by the contract to reaffix to the realty is the consumer of parts used.

(6) Elevator Installations. A large number of components are included in the installation of an elevator system. Those portions constituting the cage or platform and its hoisting machinery are fixtures. The balance of the installation, if attached to a structure or other real property will generally be "materials."

Similarly, installation of escalators and moving sidewalks are in part fixtures and in part materials.

Following are examples of components constituting part of the cage or platform and its hoisting machinery, and which are fixtures:

alarm bell
cab or car
car doors
car platform and sling
door hanger on cab
door openers
door operator on cab or car
door safety edge on cab
door sills on cab
electronic door protector
jack assembly
motors
power units and control boxes
pumps
pushbuttons on cab
wire and piping (which are components of a fixture)

Following are examples of components constituting "materials" when attached to realty:

car guides
casing section of jack assembly
guide rails
hoistway doors
hoistway door frames
hoistway door safety edge
hoistway door sills and jambs
hoistway door supports
hoistway entrance
pushbuttons on hoistway
rail brackets
sill, struts
sound insulating panels on "materials"
structural steel (unless part of cab, car, or other "fixture")
valve strainer
wire and piping attached to "materials"

Following are examples of components constituting parts of escalators or moving sidewalks which are fixtures:

staircase
moving sidewalk
moving handrails
chains
sprockets
motors
other operating mechanisms

(7) Telephone Switchboards and Instruments. Telephone switching equipment installed in a building specifically designed to accommodate the equipment or attached to a building or structure in a manner such that its removal would cause damage to the equipment or buliding in which it is installed will be considered to be "fixtures" under paragraph (a)(5) of this regulation.

Telephone handsets, modular switching equipment and standardized, off-shelf, general purpose switching equipment sold for use in general purpose office buildings constitute machinery and equipment under paragraph (a)(6) of this regulation. Handsets, modular switching equipment and standardized equipment were previously classified as fixtures.

This change in classification shall be applied prospectively only with respect to construction contracts entered into on and after July 1, 1988, by contractors other than United States construction contractors.

(8) Deep-Well Agricultural Pumps. A deep-well agricultural pump is tangible personal property if installed so that it rests in position by force of gravity and is not otherwise affixed to the land.

The pump is a fixture if:

(A) It is affixed to the land such as by concrete, bolts or screws,

(B) It is physically connected to an irrigation system such as by pipes or couplings so as to become an integral part of the system, or

(C) It is enclosed by a pump house or other building or structure.

(9) Remote Control Garage Door Openers. Remote control garage door opening units are fixtures. Portable transmitter units furnished pursuant to a construction contract are deemed to be fixtures and are taxable as provided in subdivision (b)(2)(B). Sales of portable transmitter units not a part of a construction contract, as, for example, sales of replacement units, are retail sales of tangible personal property and subject to tax as such.

(10) Excess Reimbursement.

The excess tax reimbursement provisions of Regulation 1700 apply to construction contractors.

APPENDIX A

The following is a list of typical items regarded as materials:

Asphalt
Bricks
Builders' hardware
Caulking material
Cement
Conduit
Doors
Ducts
Electric wiring and connections
Flooring
Glass
Gravel
Insulation
Lath
Lead
Lime
Linoleum
Lumber
Macadam
Millwork
Mortar
Oil
Paint
Paper
Piping, valves, and pipe fittings
Plaster
Power poles, towers, and lines
Putty
Reinforcing mesh
Roofing
Sand
Sheet metal
Steel

Stone
Stucco
Tile
Wall coping
Wallboard
Wallpaper
Wall-to-wall carpeting (when affixed to the floor)
Weather stripping
Windows
Window screens
Wire netting and screen
Wood preserver

APPENDIX B

The following is a list of typical items regarded as fixtures:

Air conditioning units
Awnings
Burglar alarm and fire alarm fixtures
Cabinets, counters, and lockers (prefabricated)
Cranes[1] (including moving parts of cranes) affixed or annexed to a building, structure or fixed work
Electric generators (affixed to and accessory to a building, structure or fixed works)
Elevators, hoists, and conveying units
Furnaces, boilers, and heating units
Lighting fixtures
Plumbing fixtures
Refrigeration units
Signs
Television antennas
Transformers and switchgear
Vault doors and equipment
Venetian blinds

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[1] Moving parts of cranes are classified as machinery and equipment when furnished and installed pursuant to fixed price construction contracts entered into prior to July 1, 1985.

APPENDIX C

The following are lists of typical items regarded as:

Machinery and Equipment

Drill presses
Electric generators (un-affixed, or, if affixed, which meet the requirements of subparagraph (a)(6))
Lathes
Machine tools
Printing presses

Not Machinery or Equipment

Fixtures and materials as defined in this regulation
Wiring, piping, etc., used as a source of power, water, etc., for machinery and equipment
Radio transmission antennas
Large tanks (i.e., over 500 barrel capacity)
Fire alarm systems
Street light standards
Cooling towers other than small prefabricated cooling units

NOTE: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Sections 6006-6010, 6012, 6012.2, 6012.8, 6012.9, 6015, 6016, 6016.3, 6016.5, 6055, 6091-6095, 6203.5, 6241-6246, 6276, 6276.1, 6379, 6384, 6386, 6421 and 6901.5, Revenue and Taxation Code. United States Contractors, see Regulation 1618.

HISTORY:

1. Renumbering from former Section 1921 and amendment of subsections (f) and (g) filed 11-3-71; effective thirtieth day thereafter (Register 71, No. 45). For prior history see Register 65, No. 23.
2. Amendment of subsection (g) filed 11-12-71; effective thirtieth day thereafter (Register 71, No. 46).

3. Amendment filed 2-25-76; designated effective 4-1-76 (Register 76, No. 9).
4. Amendment filed 8-20-76; effective thirtieth day thereafter (Register 76, No. 34).
5. Amendment of subsections (a)(3), (b)(1)(A), (b)(1)(B), (b)(6)(C), (c)(7) and (d) filed 1-19-79; effective thirtieth day thereafter. Pursuant to Chapter 1211, Statutes of 1978, the order designates an operative date of 1-1-79 (Register 79, No. 3).
6. Amendment of subsection (c) filed 8-22-80 as an emergency; effective upon filing (Register 80, No. 34). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 12-22-80.
7. Certificate of Compliance including amendment of subsection (b) transmitted to OAL 12-19-80 and filed 1-16-81 (Register 81, No. 3).
8. Amendment of subsections (c)(3), (8) and (9) filed 3-15-84; effective thirtieth day thereafter (Register 84, No. 11).
9. Amendment of subsections (c)(4) and Appendices B and C filed 4-11-86; effective thirtieth day thereafter (Register 86, No. 15).
10. Amendment of subsections (b)(1)(A), (c)(4), (c)(7)-(10) and Appendices B and C filed 6-2-88; operative 7-2-88 (Register 88, No. 24).

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

DECLARATION OF RICHARD E. NIELSEN IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed February 14, 1989)

I, Richard E. Nielsen, declare as follows:

1. I am a Deputy Attorney General employed by the State of California, Department of Justice. As part of my responsibilities I was assigned as the attorney representing the State Board of Equalization in the case of *Williams Brothers Engineering Company* v. *Board of Equalization of the State of California*, Los Angeles County Superior Court number C 443 028, filed on March 23, 1983, and in the case of *Williams Brothers Engineering Company* v. *Board of Equalization of the State of California*, Los Angeles County Superior Court number C 473 190.

2. As a part of the representation of the Board of Equalization I received the attached letters from Williams Brothers' attorney in these two cases, Arthur O. Armstrong:

A. Attached hereto as Exhibit A is a true and correct copy of a letter I received from Arthur O. Armstrong dated March 12, 1987;

B. Attached hereto as Exhibit B is a true and correct copy of a letter I received from Arthur O. Armstrong dated September 10, 1987;

C. Attached hereto as Exhibit C is a true and correct copy of a letter I received from Arthur O. Armstrong dated May 19, 1987;

D. Attached hereto as Exhibit D is a true and correct copy of a letter I received from Arthur O. Armstrong dated January 27, 1988.

3. As a apart of the representation of the Board of Equalization I received a copy of Notice of Motion to File a First Amended Complaint (No. C 443028) which included the Declaration of Arthur O. Armstrong and the Proposed Amended Complaint. Attached hereto as Exhibit E is a true and correct copy of the Notice and included documents.

4. On various dates throughout November 1988, I attempted to obtain a certified copy of the Notice of Motion to File a First Amended Complaint, etc. (No. C 443028) from the files of the Los Angeles Superior Court. Said document was not in the file and a search by court personnel failed to locate said document. Attached hereto as Exhibit F is a certified copy of the Los Angeles Superior Court's docket sheet in Case No. C 443028. The entry on said docket sheet for September 6, 1983 indicates that a Notice of Motion to File a First Amended Complaint, etc. was filed.

5. I have personal knowledge of the foregoing facts and if called and sworn as a witness I could and would competently testify thereto.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California on December 21, 1988.

/s/ Richard E. Nielsen
RICHARD E. NIELSEN

EXHIBIT "A"

LAW OFFICES
ARMSTRONG, HIRSCH & LEVINE
A Professional Corporation
1888 Century Park East
Suite 1888
Los Angeles, California 90067

March 12, 1987

VIA MESSENGER

Richard E. Nielsen, Esq.
Deputy Attorney General
Business & Tax Section
State of California
Department of Justice
3580 Wilshire Blvd., Room 800
Los Angeles, CA 90010

Dear Mr. Nielsen:

Pursuant to our telephone conversation of this morning, I'm enclosing a copy of the Notice of Trial Setting Conference in the Williams Brothers Engineering matter, scheduled for 10:30 A.M. on Wednesday, April 8, 1987, in Department 3. I apologize for not getting this to you in timely fashion--it fell in a crack between the year-end crush and the new-year crush. I very much appreciate your courtesy in confirming that you'll be there. I'll see you then.

In the interim, the Government is to get back to me on the settlement by next Wednesday. I'll let you know as soon as I hear.

Yours very truly,

/s/ A.O.A.
ARTHUR O. ARMSTRONG

AOA:jb
Enclosure
006

EXHIBIT "B"

LAW OFFICES
ARMSTRONG, HIRSCH & LEVINE
A Professional Corporation
1888 Century Park East
18th Floor
Los Angeles, California 90067

September 10, 1987

Richard Nielsen, Esq.
Department of Justice
3580 Wilshire Blvd., Suite 800
Los Angeles, CA 90010

Re: Williams Brothers Engineering

Dear Richard:

I'm returning to you under cover of this letter the original and two executed copies of the Stipulation for Partial Judgment in Case No. C 473190.

As I believe I told you, I have been orally instructed that I am to dismiss both cases. I have not yet, however, received written confirmation of this, and I don't want to actually file the dismissals until that's in hand. I do believe, however, that we should notify the Court that the case ought to be continued past the September 29 date pending filing of the dismissals. Why don't you give me a call with your thoughts on this.

Yours very truly,

/s/ Arthur O. Armstrong
ARTHUR O. ARMSTRONG

AOA:jb
Enclosures
007

EXHIBIT "C"

LAW OFFICES
ARMSTRONG, HIRSCH & LEVINE
A Professional Corporation
1888 Century Park East
Suite 1888
Los Angeles, California 90067

May 19, 1987

Richard Nielsen, Esq.
Deputy Attorney General
State of California
Department of Justice
3580 Wilshire Blvd., Suite 800
Los Angeles, CA 90010

Re: Williams Brothers Engineering

Dear Dick:

To keep you current on this case, the Government is taking a new look at the matter to make a final decision on what it wants. The good news is that the attorney from the Department of Justice who's working on the case now seems to really want to get the matter resolved in an intelligent fashion. I am, for the first time, encouraged.

I'm told that we'll have a final decision before the end of June—and I hope well before then. At that time, if it appears that it will be necessary to go to trial, I will cooperate with you in the development of whatever discovery you think necessary.

Thanks for your continuing cooperations.

Yours very truly,

/s/ A.O.A.
ARTHUR O. ARMSTRONG

AOA:jb
027

EXHIBIT "D"

LAW OFFICES
ARMSTRONG, HIRSCH & LEVINE
A Professional Corporation
1888 Century Park East
18th Floor
Los Angeles, California 90067

January 27, 1988

Richard Nielsen, Esq.
Department of Justice
3580 Wilshire Blvd., Suite 800
Los Angeles, CA 90010

Dear Richard:

This is to confirm to you that the Clerk has entered the Dismissal without prejudice of both of the WBEC cases. For your records I'm enclosing a copy of the materials filed bearing the Clerk's stamp. I'm also enclosing a copy of the Satisfaction of Judgment.

As you know, I have been told that the United States Government intends to institute an action in its own right to obtain a construction of the application of the statute to the operations at Elk Hills. That, I guess, will mean you won't be done with the matter, but I do think that in the long run everyone will benefit from a resolution of the disputes, and that the best party to present the issues is the Government.

Yours very truly,

/s/ A.O.A.
ARTHUR O. ARMSTRONG

AOA:jb
Enclosure
016

cc: Edward Jiran
Department of Energy

Kent Sloan
Williams Brothers Engineering

EXHIBIT "E"

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No. C443028

WILLIAMS BROTHERS ENGINEERING COMPANY,
an Oklahoma corporation, PLAINTIFF

vs.

BOARD OF EQUALIZATION OF THE
STATE OF CALIFORNIA, DEFENDANT

NOTICE OF MOTION SEEKING LEAVE TO FILE FIRST AMENDED COMPLAINT, POINTS AND AUTHORITIES IN SUPPORT THEREOF, DECLARATION OF ARTHUR O. ARMSTRONG, AND PROPOSED AMENDED COMPLAINT

Date: September 26, 1983

Time: 9 a.m.

Dept.: 82

TO: All parties and to their attorneys of record:

NOTICE IS HEREBY GIVEN that on Monday, September 26, 1983, at the hour of 9:00 a.m. or as soon thereafter as counsel may be heard in Department 82 of the above entitled court, located at 111 North Hill Street, Los Angeles, California, Plaintiff, WILLIAMS BROTHERS ENGINEERING COMPANY, will move for an or-

der permitting Plaintiff to file a First Amended Complaint attached hereto.

The motion will be made on the grounds that Plaintiff has a valid cause of action against the Defendant arising out of the transaction on which the above entitled action is brought, as more fully appears from Plaintiff's proposed First Amended Complaint attached hereto, and that the Defendant will not be prejudiced by allowing the filing of the amendment at this point in time.

This motion is to be based on this Notice, on the record, pleadings on file herein, on the accompanying Memorandum of Points and Authorities, and on the Declaration in support of the motion.

Dated: 8-31, 1983

/s/ Arthur O. Armstrong
ARTHUR O. ARMSTRONG

POINTS AND AUTHORITIES

I.

THE COURT MAY IN THE FURTHERANCE OF JUSTICE AND ON SUCH TERMS AS MAY BE PROPER ALLOW A PARTY TO AMEND ANY PLEADING.

Code of Civil Procedure, § 473.

II.

COURTS ARE LIBERAL IN ALLOWING AMENDMENTS SO THAT LAWSUITS MAY BE DETERMINED ON THEIR MERITS.

Desny v. Wilder, 46 Cal.2d 715, 751, 299 P.2d 257, 278 (1956)

Klopstock v. Superior Court, 17 Cal.2d 13, 19, 108 P.2d 906, 909 (1941)

Frost v. Witter, 132 Cal. 421, 426, 64 P. 705, 706 (1901)

Barr v. Carrol, 128 Cal. App.2d 23, 26, 274 P.2d 717, 719 (1954)

III.

A COURT IS VERY RARELY JUSTIFIED IN REFUSING A PARTY LEAVE TO AMEND HIS PLEADING TO STATE HIS CASE PROPERLY.

Guidery v. Green, 95 Cal. 630, 633, 30 P. 786, 787 (1892)

Crosby v. Clark, 132 Cal. 1, 8, 63 P. 1022, 1024 (1901).

Marr v. Rhodes, 131 Cal. 267, 270-271, 63 P. 364, 366 (1900)

Tate v. Superior Court, 213 Cal. App.2d 238, 251, 28 Cal. Rptr. 555 (1963)

Saari v. Superior Court, 178 Cal. App.2d 175, 180, 2 Cal. Rptr. 856, 860 (1960)

IV.

IT IS AN ABUSE OF DISCRETION TO REFUSE LEAVE TO AMEND WHERE THE MOTION IS TIMELY MADE AND THE AMENDMENT WOULD BE IN THE FURTHERANCE OF JUSTICE.

Saari v. Superior Court, 178 Cal. App.2d 175, 180, 2 Cal. Rptr. 856, 860 (1960)

Jackson v. Pacific Gas and Electric Co., 95 Cal. App.2d 204, 208, 212-214, 212 P.2d 591, 594 (1949)

V.

PERMITTING AMENDMENT 18 MONTHS AFTER ORIGINAL COMPLAINT IS NOT ABUSE OR DISCRETION IN ABSENCE OF SHOWING OF INJUSTICE OR HARDSHIP.

Bryant v. Wellbanks, 88 Cal. App. 144, 147, 263 P. 332 (1928)

VI.

THE SUPREME COURT OF THIS STATE HAS REPEATEDLY DECLARED THAT GREAT LIBERALITY SHOULD BE SHOWN BY A TRIAL COURT IN PERMITTING, WHERE IT CAN BE DONE WITHOUT WORKING A GREAT DELAY, SUCH AMENDMENTS TO PLEADINGS AS WILL FACILITATE THE PRODUCTION OF ALL FACTS BEARING UPON THE QUESTIONS INVOLVED IN THE ACTION.

San Francisco and Suburban Home Organization v. Leonard, 17 Cal. App. 254, 266, 119 P. 405 (1911)

Dated: 8-31, 1983

/s/ Arthur O. Armstrong
ARTHUR O. ARMSTRONG

DECLARATION OF ARTHUR O. ARMSTRONG IN SUPPORT OF MOTION FOR ORDER GRANTING LEAVE TO FILE FIRST AMENDED COMPLAINT

I, Arthur O. Armstrong, hereby declare the following to be true under penalty of perjury:

I am the attorney for Plaintiff in the action at hand. The original Complaint for Refund of California Sales Tax intentionally omitted any reference to federal grounds as a basis for the Complaint upon instructions from the United States Government, of which Plaintiff is an agent. Due to recent Supreme Court decisions, the United States Goverrment has now authorized Plaintiff to amend the Complaint to raise federal grounds as a basis for the Complaint. The federal grounds have now been included in Paragraph VIII, subparagraph G through I.

The Defendants will not be prejudiced by this Amended Complaint as the original Complaint was filed only six months ago, and the trial is still years away.

Dated: 8-31, 1983, at Los Angeles, California

/s/ Arthur O. Armstrong
ARTHUR O. ARMSTRONG

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

Case No. C 443928

WILLIAMS BROTHERS ENGINEERING COMPANY, an Oklahoma corporation, PLAINTIFF

vs.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, DEFENDANT

FIRST AMENDED COMPLAINT FOR REFUND OF CALIFORNIA SALES TAX PAID

[Proposed]

Plaintiff alleges, by leave of court to file this First Amended Complaint:

I.

At all times mentioned herein, Plaintiff, WILLIAMS BROTHERS ENGINEERING COMPANY, is and at all relevant times has been a corporation organized and existing under the laws of the State of Oklahoma, with its principal place of business in Kern County.

II.

Defendant, BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, is, and at all material times herein was, an agency of the State of California charged by law with the duty of administering the California Sales and Use Tax Law.

III.

Jurisdiction of this action is vested in this court under California Code of Civil Procedure § 410.10.

IV.

Venue of this action is properly based in Los Angeles County under California Revenue and Taxation Code § 6933, as the Attorney General has an office in Los Angeles County.

V.

Plaintiff filed California Sales and Use Tax Returns with Defendant when due for the period between November 14, 1975, through December 31, 1977, and Plaintiff timely paid all taxes so reported to Defendant when due.

VI.

Upon audit of Plaintiff, Defendant sent Plaintiff a Notice Of Determination under the Sales and Use Tax Law, dated July 5, 1978, stating that a deficiency in sales and use tax in the amount of $2,932,716.54 plus interest was due for the period commencing November 14, 1975, through December 31, 1977. On August 3, 1978, Plaintiff filed a Petition For Redetermination with Defendant, requesting a hearing. On January 30, 1979, a hearing before Defendant was held. On April 13, 1982, Plaintiff received notice from Defendant of its order that the deficiency in taxes originally determined be reduced by $382,381.68, leaving a balance of tax owed as redetermined of $2,550,334.86 plus interest of $1,468,221.03, for a total of taxes plus interest owed of $4,018,555.89. On or before May 13, 1982, Plaintiff paid said amount to Defendant under protest. On October 1, 1982, Plaintiff filed a Claim For Refund with the Defendant. Defendant denied the Claim For Refund and sent Notice Of Denial Of Claim For Refund on November 22, 1982. This

action is brought within ninety days of the date of such Notice. Accordingly, Plaintiff has exhausted its administrative remedies and now brings this court action under authority of California Revenue and Taxation Code § 6933.

VII.

Said asserted deficiency of $4,018,555.89 for the period commencing November 14, 1975, and ending December 31, 1977, was arbitrarily, erroneously, and illegally determined by Defendant on the basis of grossly incorrect and unwarranted assumptions, and without foundation in fact.

VIII.

The Claim For Refund filed by Plaintiff on October 1, 1982, with Defendant is attached hereto, marked Exhibit "A," and made a part hereof as though set forth in full, except for Paragraph 5.C thereof. In light of the facts set forth in the Claim for Refund incorporated herein, the alleged deficiency as set forth in the Notice of Redetermination, and the taxes collected pursuant thereto, are illegal, erroneous, excessive, and improper in that:

A. If Plaintiff is regarded, contrary to the provisions of the contract, as having acquired materials from vendors and then reselling the materials to the United States Government, such transactions by Plaintiff cannot be subjected to the California sales tax by reason of California Revenue and Taxation Code § 6381.

B. No tax can be assessed against Plaintiff on the authority of California Revenue and Taxation Code § 6384. That section provides only for a sales tax to be imposed on the vendor. If any sales tax were payable on purchases by Plaintiff on behalf of the Government, such tax would be due only by those vendors and could not be assessed against Plaintiff.

C. Further, no tax would be due from Plaintiff or any of the persons who supplied materials to Plaintiff under

California Revenue and Taxation Code § 6384 inasmuch as Plaintiff was not a "construction contractor" within the meaning of that section. This is true as to all of the materials purchased by Plaintiff.

D. Plaintiff cannot be subject to use tax on any of the property purchased by the United States Government through Plaintiff since Plaintiff never held title to any of these items and cannot, therefore, make a taxable "use" of these materials. *Lockheed Aircraft Corp. v. State Board of Equalization*, 81 Cal. App. 3d 257 (1978).

E. No tax was due from Plaintiff or any of those persons who supplied materials to Plaintiff on purchases made by Plaintiff under the contract for the United States Government since Plaintiff was acting solely as an agent for the United States Government, and imposition of a tax on purchases made by the United States Government is prohibited by California Revenue and Taxation Code § 6381.

F. As to the NAVFAC procurements, a refund based on the exclusion of $10,166,154.18 from the measure of the tax should be made.

G. If Plaintiff is regarded, contrary to the provisions of the contract, as having acquired materials from the vendors and then reselling the materials to the United States Government, such transactions by Plaintiff cannot be subject to the California Sales Tax by reason of the United States Constitution.

H. No tax was due from Plaintiff or any of those persons who supplied materials to the Plaintiff on purchases made by Plaintiff under the contract for the United States Government since Plaintiff was acting solely as an agent of the United States Government, and imposition of a tax on purchases made by the United States Government is prohibited by the United States Constitution.

I. The application of the California Sales and Use Tax to the purchase of materials by the United States

Government under California Revenue and Taxation Code § 6384 would discriminate against the Government and those doing business with it, in that the basis of the tax is different from that applicable to contractors doing business with private parties and with California governmental entities.

WHEREFORE, Plaintiff prays for judgment against Defendant

(1) in the amount of $4,018,555.89 and such other amounts to which Plaintiff may be entitled,
(2) for interest allowable by statute,
(3) for cost of suit hereof, and
(4) for such other and further relief as this court may deem just and proper.

Date: 8-31

ARMSTRONG, HENDLER & HIRSCH
A Professional Corporation

By: /s/
Attorneys for Plaintiff

SMM: 9-H

October 1, 1982

State Board of Equalization
1020 North Street
Sacramento, California 95814

Attention: Refund Unit

Re: *Claim for Refund, California Sales Tax Matter*

Gentlemen:

Williams Brothers Engineering Company ("Taxpayer" or "WBEC") herein, the person against whom the determination described below was made, on behalf of itself and the United States Government, the real party in interest, respectfully submits the following Claim for Refund ("Claim"):

1. *Identification of Taxpayer.*

Williams Brothers Engineering Company
P.O. Box 86
Tupman, California 93276

2. *Periods Involved.*

November 14, 1975, through December 31, 1977

3. *Prior Proceedings.*

Taxpayer filed a Petition for Redetermination (the "Petition"), and a hearing was held by the State Board of Equalization. A Notice of Redetermination, attached as Exhibit 1, dated April 13, 1982, was served on Taxpayer. Taxpayer timely paid the alleged deficiency. This Claim is filed within 6 months of the date of such payment.

4. *Refund Claimed.*

A refund is claimed for the entire amount paid as above set forth, in the amount of $2 550,334.86, together with interest as provided by law.

5. *Grounds for Refund.*

5.A *Factual Background.*

This claim for refund is filed as required by Section 6932 (all section references, unless otherwise indicated are to the California Revenue and Taxation Code) for the purpose of exhausting Taxpayer's administrative remedies in order that the issues here involved can be tested through appropriate litigation. The factual matters upon which the Claim is based, and many of the legal arguments, have been the subject of extensive submissions to the Board of Equalization in connection with the Petition. Taxpayer hereby incorporates by reference the factual submission designated "Preliminary and Jurisdictional Statement", which included copies of all of the relevant documents, submitted to Mr. D. J. Hennessey at a Staff Hearing on January 30, 1979, and the Supplemental Brief submitted to the Board of Equalization following the hearing before it on January 8, 1981.

As set forth in those materials, Petitioner entered into a contract with the United States Government, through the Secretary of Navy (now the Secretary of Energy pursuant to P.L. 95-91), dated October 13, 1975. For convenience, an additional copy of that contract is appended hereto as Exhibit 2.

Pursuant to the said Contract, Petitioner, acting on behalf of the United States Government and not in its own right, negotiated with various suppliers to provide articles of tangible personal property to be used by the United States Government in work being conducted at Elk Hills. Under the terms of the Contract with the United States Government, Petitioner never had title to

any of such materials, and did not become the beneficial owner of any interest therein. Title thereto passed directly from the various vendors to the United States Government pursuant to the provisions of the Contract, and of various agreements with vendors which were negotiated by Petitioner on behalf of the United States Government.

The materials acquired by the United States Government through WBEC were, in general, ultimately used in the construction of improvements to the Elk Hills facilities.

In some cases, installation of the materials in connection with projects was administered by WBEC. In that capacity, WBEC has the responsibility of hiring a subcontractor designated by the United States Government to complete installation of the material. WBEC did not, however, have responsibility for the job or for completion of the installation. Its function was solely that of servicing the administration of the contract, and not of a construction contractor.

Certain materials acquired by the United States Government through WBEC were placed in inventory. From inventory, they were drawn on as needed for installation in various projects at Elk Hills, Some of these projects were ones administered by other contractors; some of them were administered by WBEC.

In both of these cases, it is WBEC's position that it was not a "construction contractor" within the meaning of Section 6384. The conclusion to the contrary set forth in the Notice of Redetermination is erroneous.

5.B *Special Item: The NAVFAC Procurements.*

The Board, in its Notice of Redetermination, and throughout these proceedings, has apparently agreed that amounts reflecting the cost of materials purchased through WBEC which were installed by the Naval Facilities Command ("NAVFAC"), on the LTS#1 Plant and the High

Pressure Injection Plant should be excluded from the measure of the tax, since WBEC's only function as to these procurements relates to purchasing, and WBEC is not the "construction contractor" within the meaning of Section 6384 as to these procurements.

Despite this agreement on the legal issues the measure of the tax set forth in the Notice of Redetermination does not exclude the cost of materials procured for these projects on the grounds that "documentation necessary to delete" these purchases had not been submitted.

There is attached as Exhibit "3" a Summary setting forth the amount of these procurements improperly included in the measure of the tax, aggregating $10,166,154.18. The invoices described thereon are not submitted here since their bulk renders such a submission impractical. They are, however, available at the offices of the Taxpayer for review and audit.

5.C *Legal Basis for Refund.*

In the light of the foregoing, the alleged deficiency as set forth in the Notice of Redetermination, and the taxes collected pursuant thereto, are illegal, erroneous, excessive and improper in that:

A. If WBEC is regarded, contrary to the provisions of Contract as having acquired materials from vendors, and then reselling it to the United States Government, such transactions by WBEC cannot be subjected to the California sales tax by reason of the United States Constitution and Section 6381.

B. No tax can be assessed against WBEC on the authority of Section 6384. That Section provides only for a sales tax to be imposed on the vendor. If any sales tax were payable on purchases by WBEC on behalf of the Government, such tax would be due only by those vendors, and could not be assessed against WBEC.

C. Further, no tax would be due from WBEC or any of the persons who supplied materials to WBEC under

Section 6384 inasmuch as WBEC was not a "construction contractor" within the meaning of that section. This is true as to all of the materials purchased by WBEC.

D. WBEC cannot be subject to use tax on any of the property purchased by the United States Government through WBEC since WBEC never held title to any of these items and cannot, therefore, make a taxable "use" of these materials. *Lockheed Aircraft Corp. v. State Board of Equalization*, 81 Cal.App. 3d 257 (1978).

E. No tax was due from WBEC or any of those persons who supplied materials to WBEC on purchases made by WBEC under the contract for the United States Government since WBEC was acting solely as an agent for the United States Government, and imposition of a tax on purchases made by the United States Government is prohibited by the Constitution of the United States, and by Section 6381.

F. The application of the California Sales and Use Tax to the purchase of materials by the United States Government under Section 6384 would discriminate against the Government and those doing business with it, in that the basis of the tax is different from that applicable to contractors doing business with private parties and with California governmental entities.

G. As to the NAVFAC procurements, a refund based on the exclusion of $10,166,154.18 from the measure of the tax should be made.

6. *Communications.*

It is respectfully requested that copies of all future notices and correspondence be sent to Taxpayer's representative:

Arthur O. Armstrong, Esq.
Armstrong, Hendler & Hirsch
1888 Century Park East, Suite 1888
Los Angeles, California 90067

Telephone: (212) 553-0305

Executed at Elk Hills, California, on this 7th day of October, 1982.

WILLIAMS BROTHERS
ENGINEERING COMPANY

By: /s/ C. H. Barfield
C. H. BARFIELD
General Manager

VERIFICATION

I am an officer of the Plaintiff in the above entitled proceeding; I have read the foregoing First Amended Complaint and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on August 31, 1983 at Elk Hills, California.

/s/ Raymond C. Harbert
RAYMOND C. HARBERT
Vice President
Title

SUPERIOR COURT LOS ANGELES COUNTY C 443028

WILLIAMS BROS ENGR CO — ARMSTRONG-HENDLER-HIRSCH

CALIF EQUAL BD

John K. Van De Kamp

NATURE OF ACTION: MISC CIVIL COMPLAINT-MONEY INVOLVED — CODE: 0601

REPORTER

REPORTER

YEAR	MONTH	DAY	PROCEEDINGS	FILED DOC	FEES
1983	FEB	18	COMPLAINT FILED AND SUMMONS ISSUED	1	92.00
83	3	23	Dept Board of Equalization of the State of Calif Kamp	2	
83	9	6	Pltf's mot for leave to file 1st Amended Compl 11-15-83 9 AM D82	3	14
83	10	7	D's & A's in oppo to Mot seeking leave to file first amended compl	4	
83	11	15	Hrg cont 12-29-83 9 AM D82		
83	10	19	Ntc of Hearing on Dem to Amended Compl 11-15-83 9 A.M D82	5	12
83	12	29	Dem o/c	6	
84	1	9	P's & D's in oppo to Dem to amended compl	7	
84	1	23	Hrg to be held on Dem		
84	3	5	P's Mot for Leave to file 2nd Amended Compl & Proposed 2nd Amended Compl & Order 3-26-84 9 AM D82	8	14
84	3	26	Stip to file 2nd amd Compl + Ord	9	
84	3	30	Mo granted re ARB	10	
1984	May	27	FILED		
84	05	29	ARBITRATION CONFERENCE SET Aug 15 84 10:30 am D3	11	
84	8	15	STIPULATE NOT TO ARBITRATE 14-3	12	
85	8	12	Partial Judgment Pursuant to Stip. D-1A	13	
85	8	12	Stip. for Partial Judgment D-1A	14	
85	9	30	Ack & Rec Partial Status of Judgt	15	
86	1	25	REQUEST FOR ENTRY OF DISMISSAL FILED		
86	1	25	DISMISSED BY ATTY FOR PLFF w/out pre; except for issues in Compl Cmp Rvsd pt 1		

EXHIBIT "F"

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

DECLARATION OF ROBERT D. MILAM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed February 14, 1989)

I, Robert D. Milam, declare as follows:

1. I am an attorney licensed in the State of California and in the United States District Court, Eastern District of California. I am employed by the State of California Department of Justice as a Deputy Attorney General. Part of my overall responsibility is to represent the defendants in the above-entitled case.

2. As part of my duties in this case I served upon plaintiffs a request for production of documents. Attached hereto as exhibit A is a true and correct copy of the request.

3. Plaintiff United States of America responded to my request for production of documents. Attached hereto as exhibit B is a true and correct copy of its written response.

4. As part of the production of documents, the United States sent me the following documents:

A. Copies of orders placed with third party suppliers by WBEC for each year of the contract. Attached hereto as exhibit C are true and correct copies of two such orders.

B. A copy of a modification of WBEC's contract with plaintiff in which the term "prime contractor" is substituted for the words "agent" and/or "purchasing agent". Attached hereto as exhibit D are true and correct copies of a cover letter and two pages from the contract modification.

C. A copy of modification of WBEC's contract with the United States which established the terms and conditions of WBEC's responsibilities during the "post-operation" period, the period during which WBEC would finish its contract obligations and prior to the time a new contractor would assume responsibility. Attached hereto as exhibit E are true and correct copies of a portion of these modifications relating to the United States government's payment of attorney's fees in the WBEC state court cases.

5. I have personal knowledge of the foregoing facts and if called and sworn as a witness I could and would competently testify to those facts.

Executed at Sacramento, California on February 13, 1989.

/s/ Robert D. Milam
ROBERT D. MILAM

EXHIBIT "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CIV. S-88-600-LKK-EM

UNITED STATES OF AMERICA, PLAINTIFF

vs.

STATE OF CALIFORNIA, and CALIFORNIA BOARD OF EQUALIZATION, DEFENDANTS

REQUEST FOR PRODUCTION OF DOCUMENTS

TO PLAINTIFF AND ITS ATTORNEY OF RECORDS:

You are hereby requested by defendant to produce the following documents in accordance with Rule No. 34 of the Federal Rules of Civil Procedure. The documents shall be produced at the Office of the Attorney General, 1515 K Street, Room 305, Sacramento, California or mailed ot Post Office Box 944255, Sacramento, California 94244-2550, Attn: Robert D. Milam, on November 14, 1988 at 10:00 a.m.

REQUEST NO. 1

The Unit Plan Contract between Standard Oil Co. of California (now Chevron U.S.A., Inc.) and the names as described in paragraph 9 of the Complaint.

REQUEST NO. 2

All Contracts described as management and operating contracts as described in paragraphs 10 and 11 of the Complaint between the United States and WBEC.

REQUEST NO. 3

U.S. Department of the Treasury For Financial Institutions to Receive Federal Funds Under Check-Paid Technique in a Letter of Credit—Treasury Financial Communications System as described in your response to Defendant's Interrogatory No. 20.

REQUEST NO. 4

Copies of two of the orders placed with third party suppliers by WBEC for each year of the contract.

Dated: October 14, 1988.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General
of the State of California

ROBERT F. TYLER
Supervising Deputy Attorney General

/s/ Robert D. Milam
ROBERT D. MILAM
Deputy Attorney General

Attorneys for Defendants

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV S-88-600 LKK-EM

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA; and CALIFORNIA STATE BOARD OF EQUALIZATION, DEFENDANTS

PLAINTIFF'S RESPONSE TO DEFENDANT'S REQUEST FOR PRODUCTION OF DOCUMENTS

The plaintiff, the United States of America, responds to the defendants' request for production of documents as follows:

REQUEST FOR PRODUCTION NO. 1:

The Unit Plan Contract between Standard Oil Co. of California (now Chevron U.S.A., Inc.) and the names as described in paragraph 9 of the Complaint.

RESPONSE TO REQUEST NO. 1:

Copies of the Unit Plan Contract and the Amendatory and Supplemental Agreement are attached hereto as Exhibits A and B, respectively.

REQUEST FOR PRODUCTION 2:

All Contracts described as management and operating contracts as described in paragraphs 10 and 11 of the Complaint between the United States and WBEC.

RESPONSE TO REQUEST NO. 2:

Copies of the Navy/WBEC and Department of Energy/WBEC contracts are attached hereto as Exhibits C and D, respectively.

REQUEST FOR PRODUCTION NO. 3:

U. S. Department of the Treasury For Financial Institutions to Receive Federal Funds Under Check-Paid Technique in a Letter of Credit—Treasury Financial Communications System as described in your response to Defendant's Interrogatory No. 20.

RESPONSE TO REQUEST NO. 3:

A copy of the Treasury procedures for letters-of-credit is attached hereto as Exhibit E.

REQUEST FOR PRODUCTION NO. 4:

Copies of two of the orders placed with third party suppliers by WBEC for each year of the contract.

RESPONSE TO REQUEST 4:

Samples of the purchase orders requested are attached hereto as Exhibit F.

DATED: November 22, 1988.

Respectfully submitted,

DAVID F. LEVI
United States Attorney

YOSHINORI H. T. HIMEL
Assistant United States Attorney

WILLIAM S. ROSE, JR.
JOHN J. MCCARTHY
RICHARD A. CORREA
Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 227
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 724-6555

By: /s/ John J. McCarthy
JOHN J. MCCARTHY
Attorneys for Plaintiff,
United States of America

EXHIBIT "C"

WILLIAMS BROTHERS ENGINEERING CO.
OPERATOR
NAVAL PETROLEUM RESERVE NO. 1
Contract NOd 10068
P.O. Box 86
Tupman, CA. 93276

PURCHASE ORDER/ RECEIVING & SHIPPING REPORT

Certified for National Defense under DMS and/or DPS Regulation No. 1 Rating: DO-C-9.

PURCHASE ORDER NO. E-20018 DATE 6/8/76 PAGE 1 OF 1

REV. _____ TOTAL L/I: _____ VENDOR NO. _____

ACCT. CODE _____ CHARGE NO. Carneros WELL NO. _____

JOB NO. _____ SUB. ACCT. _____ P.O. AMT. $135,470.65

ALTERNATE COST DISTRIBUTION	ACCT. CODE	CHARGE NO.	WELL NO.

VERIFIED BY: _____

TO:
Equipment Renewal Co.
300 Metro Bank Bldg.
Denver, Colo. 80202

SHIP TO:
Williams Brothers Engineering Co.
Naval Petroleum Reserve No. 1
Elk Hills, CA

FOR INFORMATION CONTACT:
Bill Carroll WC
TEL: (805) 763-4131 EXT.: 356

DISCOUNT TERMS: Net 30 days

F.O.B.: Bakersfield, CA

METHOD OF SHIPMENT: Best Way

SHIPPING POINT:

SUBMIT INVOICES: *(Original and one copy unless otherwise specified) to Williams Brothers Engineering Co., ATTN: Controller, P.O. Box 86, Tupman, CA. 93276. PURCHASE ORDER NUMBER shown above must be indicated on all invoices, shipping papers, and correspondence. State discount terms of payment on invoices. Cash discount period to commence with date of receipt of material or upon receipt of invoice, whichever is later. No charge for packing, loading, or drayage will be allowed unless expressly provided in this order.*

SCHEDULE								RECEIVING AND SHIPPING		
ITEM	QUANTITY ORDERED	UNIT	DESCRIPTION	C/D	UNIT PRICE	AMOUNT	DELIVERY DATE	QUANTITY RECEIVED	AMOUNT	DEBD
1	5	ea.	Wellhead Assembly, Dual Completion, 5000# PSI in accordance with our Specifications on RFP E-20018 and your Response to same dated May 18, 1976.		$26,352.13	$131,760.65	As Requested			
			Plus Freight from Houston		742.00	3,710.00				
			Field Services are to be in accordance with your stated charges on file with us and part of your quotation of May 18, 1976 (Service Charges dated November 25, 1975)		27,094 13	$135,470.65				
			Show purchase order number on all shipping documents and invoices.							
			CONFIRMING TO BILL STARK					N. Cavaleri		

Your offer is hereby accepted as to the line items listed above and on any continuation sheet(s). The request for proposal (RFP), if any, and such provisions, representations, certifications, and specifications, as are attached or incorporated by reference herein are a part of this order.

WILLIAMS BROTHERS ENGINEERING CO.

BY R.C. Harbert
AUTHORIZED REPRESENTATIVE

TO BE VALID THIS PURCHASE ORDER MUST ☐ NEED NOT BE ☐ APPROVED BY THE NAVY AUTHORIZED REPRESENTATIVE.

OFFICER-IN-CHARGE, NAVAL PETROLEUM RESERVE NO. 1

REC'D DATE ___ ___

R & I NO.

SHIPPED BY:	BILL OF LADING NO.	NO. PIECES	WEIGHT	ROD

I certify that the services herein were satisfactorily completed, or the articles specified herein have been inspected both as to condition and quantity and have been accepted as satisfactory or rejected as indicated above.

C

BY _____
WILLIAMS BROTHERS ENGINEERING CO.

WILLIAMS BROTHERS ENGINEERING CO.
OPERATOR
NAVAL PETROLEUM RESERVE NO. 1
Contract NOd 10068
P.O. Box 86
Tupman, CA. 93276

PURCHASE ORDER/ RECEIVING & SHIPPING REPORT

Certified for National Defense under DMS and/or DPS Regulation No. 1 Rating: DO C-9.

FOR INFORMATION CONTACT: Bill Carroll WF
TEL: (805) 763-4131 EXT.: 356

DISCOUNT TERMS: 20th Prox
F.O.B.: Destination
METHOD OF SHIPMENT:
SHIPPING POINT:

PURCHASE ORDER NO. E-40003 DATE 6/24/76 PAGE 1 OF 1

REV. _____ TOTAL LI: _____ VENDOR NO. 352-242, 327-2
ACCT. CODE _____ CHARGE NO. _____ WELL NO. 326-31S, 322
JOB NO. _____ SUB. ACCT. _____ P.O. AMT. $116,832.04

	ACCT. CODE	CHARGE NO.	WELL NO.
ALTERNATE COST DISTRIBUTION			

VERIFIED BY: _____

TO:
National Supply Company
Division of ARMCO Steel Corporation
P.O. Box 829
Long Beach, CA 90800

SHIP TO:
Williams Brothers Engineering Co.
Naval Petroleum Reserve NO. 1
Elk Hills, CA

SUBMIT INVOICES: (Original and one copy unless otherwise specified) to Williams Brothers Engineering Co., ATTN: Controller, P.O. Box 86, Tupman, CA. 93276. PURCHASE ORDER NUMBER shown above must be indicated on all invoices, shipping papers, and correspondence. State discount terms of payment on invoices. Cash discount period to commence with date of receipt of material or upon receipt of invoice, whichever is later. No charge for packing, loading, or draying will be allowed unless expressly provided in this order.

SCHEDULE

ITEM	QUANTITY ORDERED	UNIT	DESCRIPTION	C/D	UNIT PRICE	AMOUNT	DELIVERY DATE	RECEIVING AND SHIPPING: QUANTITY RECEIVED	AMOUNT	CODE
1	4	ea.	Dual Xmas Tree and Tubing Head assembly in accordance with our RFP-E-40003 dated 6-8-76 and your response dated 6-17-76. Item 6 will be changed to read: WKM Safety-Guard Pneumatic Actuator. A substitution of an R-45 Ring Gasket is acceptable instead of an RX Ring. Show purchase order number on all shipping documents and invoices. Equipment should be assembled and tested at Vendors Warehouse and stored there until needed. CONFIRMING TO GENE WOOD		$29,208.01	$116.832.04	1 in Bal.	3 weeks 5 weeks		

N. Cavaleri

Your offer is hereby accepted as to the line items listed above and on any continuation sheet(s). The request for proposal (RFP), if any, and such provisions, representations, certifications, and specifications, as are attached or incorporated by reference herein are a part of this order.

WILLIAMS BROTHERS ENGINEERING CO.

R.C. Harbert

BY _____
AUTHORIZED REPRESENTATIVE

TO BE VALID THIS PURCHASE ORDER MUST ☐ NEED NOT BE ☐ APPROVED BY THE NAVY AUTHORIZED REPRESENTATIVE.

OFFICER-IN-CHARGE, NAVAL PETROLEUM RESERVE NO. 1

SHIPPED BY:	BILL OF LADING NO.	NO. PIECES	WEIGHT	ROD

REC'D DATE ____ ____

R & I NO.

I certify that the services herein were satisfactorily completed, or the articles specified herein have been inspected both as to condition and quantity and have been accepted as satisfactory or rejected as indicated above.

BY _____
WILLIAMS BROTHERS ENGINEERING CO.

DEPARTMENT OF THE NAVY
NAVAL PETROLEUM RESERVES IN CALIFORNIA
POST OFFICE BOX 11, TUPMAN, CALIFORNIA 93276
TELEPHONE (TAFT, CALIF.) 763-4131

NOd-10068
4330.1-8
Serial: 1534
29 JUN 1977

From: Officer in Charge, Naval Petroleum Reserves in California
To: General Manager, WBEC, UO-NPR #1

Subj: Change Order P-00012 to Contract NOd-10068

Ref: (a) Operator's Contract NOd-10068
(b) Change Order P-00012 to NOd-10068, effective 22 Jun 77

1. Reference (a) has been changed by reference (b) to delete the words "purchasing agent" from Section IV(e)(7) of reference (a).

2. Accordingly, effective immediately, no subcontracts or purchase orders shall be awarded by WBEC, in its capacity as Operator, which either state or imply that WBEC is acting as the "purchasing agent" or "agent" of the U.S. Government. Further, all potential bidders on all existing RFP's shall be notified that WBEC is acting as the prime contractor and not as an agent for the Government and any reference to WBEC as the "agent" of the Government shall henceforth be deleted from all future RFP's.

R. G. MARTIN

Copy to:
Operating Committee, UO-NPR #1
DNPR

RECEIVED
JUN 29 1977
UO-NPR #1

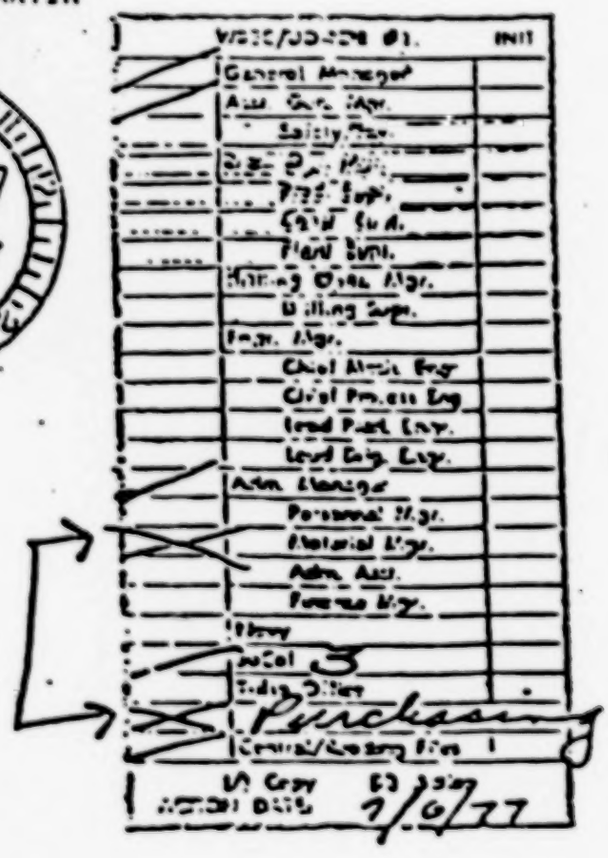

EXHIBIT "D"
127

RECEIVED JUL 8 1977

TELEPHONE (TAFT, CALIF.) 763-4131

4330.1-B
Serial: 1615
8 JUL 1977

From: Officer in Charge, Naval Petroleum Reserves in California
To: General Manager, WBEC, UO-NPR #1

Subj: Contractor's Implementation of Modification P00012, Contract N0d-10068

Ref: (a) WBEC ltr of July 6, 1977
(b) Change Order P-00012 to Contract N0d-10068, effective June 22, 1977

1. Reference (a) outlines the WBEC suggested changes to subcontract and purchase order terms and conditions, as well as RFP's, in compliance with reference (b). These changes would amend Article I of the various types of subcontracts, purchase orders and RFP's by substituting the words "prime contractor" for the words "agent" and/or "purchasing agent."

2. While the change recommended in reference (a) will provide that WBEC is the government's prime contractor, Article I, without the deletion of the phrase which indicates payment will be made on behalf of the government, would nevertheless suggest the continued existence of an agency relationship. Therefore, any reference therein to the effect that payment is made on behalf of the government shall be deleted as well.

3. Consent will be given to those procurements currently under review, with the understanding that the Operator will substitute proper terms and conditions not inconsistent with the above, before sending the procurement to the supplier for signature.

4. Since the Purchasing Department incorporates the terms and conditions by reference, and not as an enclosure, each current supplier should be notified of these changes in writing, before any further purchases are made, and should be forwarded copies of the revised terms and conditions. It is strongly recommended that WBEC refrain from inviting any supplier, subcontractor, etc., to consider a change in price. Further, submission of procurements to NPRC for approval should not be held in abeyance pending response to such notification.

R. G. MART

Copy to:
Operating Committee, UO-NPR #1
DNPR (041)

STANDARD FORM 30, AUG 1980
GENERAL SERVICES ADMINISTRATION
FAR (48 CFR) 53.243

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

PAGE 1A OF 36

1 AMENDMENT/MODIFICATION NO.	2 EFFECTIVE DATE	3 REQUISITION/PURCHASE REQUEST NO.	4 PROJECT NO. (If applicable)
M051	See Blk 19	01-HSRA32104-.006	

5 ISSUED BY	CODE	6 ADMINISTERED BY (If other than Item 5)	CODE
U.S. Department of Energy Office of Procurement Operations 1000 Independence Avenue, S.W. Washington, D.C. 20585	MA-453.1	U.S. Department of Energy Naval Petroleum Reserves in California P.O. Box 11 Tupman, CA 93276	

7 CONTRACTOR CODE / FACILITY CODE
NAME AND ADDRESS

Williams Brothers Engineering Company
ATTN: Raymond C. Harbert
6600 South Yale Avenue
Tulsa, OK 74117

(Street, city, county, state, and ZIP Code)

8
☐ AMENDMENT OF SOLICITATION NO. _____
DATED _____ (See Item 9)
☒ MODIFICATION OF CONTRACT/ORDER NO. DE-AC01-80RA32049
DATED 9/30/80 (See Item 11)

9 THE ABOVE APPLIES ONLY TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in Item 13. The hour and date specified for receipt of Offers ☐ is extended ☐ is not extended.

Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By signing and returning _____ copies of this amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGEMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

10 ACCOUNTING AND APPROPRIATION DATA (If required)

N/A

B/NC- B133

11 THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS

A. ☐ This Change Order is issued pursuant to: _____
The Changes set forth in Item 13 are made in the above numbered contract/order.

B. ☐ The above numbered contract/order is modified to reflect the administrative changes (such as changes in paying office, appropriation data, etc.) set forth in Item 13.

C. ☒ This Supplemental Agreement is entered into pursuant to authority of: P.L. 95-91; Title 10, U.S.C. Chapter 641; and the mutual agreement of the parties

D. Other (Specify type of modification and authority) as set forth in Item 13.

12 DESCRIPTION OF AMENDMENT/MODIFICATION

The purposes of this modification are to extend the basic contract to include a post operation period (August 1, 1985 to July 31, 1987) and to establish the terms and conditions for this period. During the post-operation period, Williams Brothers Engineering Company (WBEC) shall provide for the orderly closeout of those contract affairs not associated with the functions and responsibilities that are assumed by the succeeding management and operating contractor.

The provisions of the basic contract are hereby deleted for the post operation period. The post operation period shall be conducted under the terms and conditions attached hereto.

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remain unchanged and in full force and effect.

13
☐ CONTRACTOR/OFFEROR IS NOT REQUIRED TO SIGN THIS DOCUMENT ☒ CONTRACTOR/OFFEROR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN 5 COPIES TO ISSUING OFFICE

14 NAME OF CONTRACTOR/OFFEROR	15 UNITED STATES OF AMERICA
BY Raymond C Harbert (Signature of person authorized to sign)	BY Trudy Wood (Signature of Contracting Officer)
14B NAME AND TITLE OF SIGNER (Type or print) VICE PRESIDENT	14C DATE SIGNED 7/24/85
15B NAME OF CONTRACTING OFFICER (Type or print) Trudy Wood	15C DATE SIGNED 7/31/85

NSN 7540-01-152-8070 — Prescribed by GSA — FAR (48 CFR) 53.243

EXHIBIT "E"
129

• • • •

c. Liquidate WBEC investment plan assets by distribution of funds to individual employees or transfer of employee's balance to the BPOI/Bechtel plan, not later than January 31, 1986. Provide the Contracting Officer, Administrative Contracting Officer and the Director, Office of Industrial Relation, confirmation that this action has been completed.

d. Provide financial & claim information on casualty and group insurance policies as detailed on Exhibit 2, to the Director, Office of Industrial Relations, not later than October 31, 1985.

4. Resolve Outstanding Litigation:

The purpose of this task is to dispose of all existing lawsuits deriving from WBEC's tenure as operation of NPRC in the manner most favorable to the common interests of the DOE and WBEC. Attached is a complete list (Exhibit 3) of the pending litigation and known potential litigation. Unless prior approval of the Administrative Contracting Officer is received, the legal fees associated with pursuit of these cases shall not exceed $5.000 each, except for the two cases at the State Board of Equalization which shall be limited to $25,000 each. WBEC shall:

a. Coordinate information and document requirements for outside counsel;

b. Assist outside counsel to represent and defend WBEC's positions in litigation.

c. Monitor progress of lawsuits and justifications for costs of legal counsel;

d. Confer with and provide documentation to DOE on all pertinent developments regarding outstanding litigation;

e. Obtain DOE approval on litigation matters, particularly all proposed settlements, as required by contract provision 9-50.704-31 Litigation and Claims; and

f. Beginning August 31, 1985, provide a monthly status report on all outstanding cases. This report shall be written in the same format as the reports WBEC is currently providing to DOE. One copy of each report shall be provided to: (1) Contracting Officer, (2) General Counsel for DNPOSR, (3) NPRC Legal Counsel, and (4) Administrative Contracting Officer.

5. Future Litigation:

a. Claims and litigation, shal be processed in accordance with contract Clause 9-50.704-31 Litigation and Claims.

b. WBEC shall not be reimbursed for any costs incurred in the pursuit or defense of a claim or litigation by or against the Government.

Attachment B
Exhibit 3

WILLIAMS BROTHERS ENGINEERING COMPANY
OUTSTANDING NPRC RELATED LAWSUITS
AS OF JULY 31, 1985

Parties	Type of Action	File Date	Amount Sought	Insurance Coverage
ABASSI vs. WBEC	Wrongful Discharge	01/25/85	Not Specified	None
MAXEY vs. WBEC	Wrongful Discharge	10/11/84	$3,000,000 + damages	None
ROGERS vs. WBEC	Wrongful Discharge	4/21/83	Not Specified	None
YAMAS vs. WBEC	Breach of Contract	5/09/84	$3,500,000	None
ARCENAUX vs. WBEC	Personal Injury	3/31/83	Not Specified	Comp. Liab. Ins.
BORUNDA vs. WBEC	Inducement to Breach Contract	3/21/83	$250,000 + damages	Comp. Liab. Ins.

Parties	Type of Action	File Date	Amount Sought	Insurance Coverage
DAVIDSON vs. WBEC	Personal Injury	12/07/82	$20,000 +	Comp. Liab. Ins.
HAWKINS vs. WBEC	Personal Injury	11/30/82	$20,000 + damages	Comp. Liab. Ins.
JOHNSON vs. WBEC	Personal Injury	1/15/85	Not Specified	Comp. Liab. Ins.
KUGE vs. WBEC	Personal Injury	4/15/85	$100,000 + damages	Comp. Liab. Ins.
PACHECO vs. WBEC	Personal Injury	6/20/83	Not Specified	Comp. Liab. Ins.
PARIS vs. WBEC	Personal Injury	3/31/83	$10,000 + damages	Comp. Liab. Ins.
SO. CAL. GAS vs. WBEC	Damages to Real Property	4/12/83	$35,254	Comp. Liab. Ins.
TAYLOR vs. WBEC	Personal Injury	5/5/83	Not Specified	Comp. Liab. Ins.

WBEC vs. GEARHART	Breach of Contract	10/05/84	$98,000	N/A
WBEC vs. CALIFORNIA STATE BOARD OF EQUALIZATION	Sales Tax Refund 11/75-12/77	2/18/83	$4,018,555 + interest	N/A
WBEC vs. CALIFORNIA STATE BOARD OF EQUALIZATION	Sales Tax Refund 1/78-12/81	10/26/83	$10,118,297 + interest	N/A

Note: The above listing does not include personal injury claims against Williams Brothers covered under the Workers Compensation Policy with Western Employees Insurance Co.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed February 15, 1989)

The plaintiff, the United States of America, hereby moves this Court, pursuant to the pretrial scheduling order and to Rule 56 of the Federal Rules of Civil Procedure, for entry of an order granting it summary judgment on the grounds that under California law the manager and operator of the Government's Naval Petroleum Reserve No. 1 (NPR-1), William Brothers Engineering Company (WBEC), was not a construction contractor because it was prohibited by the Government from engaging in construction, did no construction work, and was not responsible for the installation or affixation of the property it purchased or for the performance of the contractors who did the construction installation and affixation and thus its purchases were not subject to California sales taxes because they were sales to WBEC for the purpose of resale to the United States.

This motion is supported by the supporting memorandum of points and authorities, all other pleadings filed herein and by the Declaration of Kenneth Meeks with and the attachments thereto, including the WBEC/Navy contract, No. Nod-10068, and the WBEC/Department of Energy Contract, No. DE-AC01-80RA32049, which are attached to this motion as Exhibit A, and the Declaration of Raymond Harbert, with the attachments thereto, which are attached to this motion as Exhibit B, all of which

demonstrate that there is no genuine issue as to any material fact and that the plaintiff, the United States, is entitled to judgment as a matter of law.

DATED: February 10, 1989.

Respectfully submitted,

DAVID F. LEVI
United States Attorney

YOSHINORI H. T. HIMEL
Assistant United States Attorney

JAMES I. K. KNAPP
JOHN J. MCCARTHY
RICHARD A. CORREA
Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 227
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 724-6555

By: /s/ John J. McCarthy
JOHN J. MCCARTHY

Attorneys for Plaintiff,
United States of America

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

DECLARATION OF KENNETH MEEKS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed February 15, 1989)

I, *Kenneth Meeks*, hereby declare and state:

1. I am employed by the United States Department of Energy (DOE) as Director, Contracts and Financial Management Division, Naval Petroleum Reserve No. 1 (NPR-1) located at Elk Hills, Kern County, California where I have served in this capacity since May 1980. As Director I am the "Contracting Officer" for DOE's contract to operate the Reserve. Among my responsibilities are: administration of DOE's contract with the operating contractor of NPR-1 and subcontracts executed by the operating contractor for purchases of goods and services; financial oversight of the management and auditing of the expenditure of government funds by the operating contractor; administrative oversight of the management of and accountability for government property by the contractor; and collection of revenues.

2. NPR-1 is one of three Naval Petroleum Reserves. The others are NPR-2 located at Buena Vista Hills, California and HPR-3 located near Casper, Wyoming. The Reserves, including NPR-1, were established by a series of Executive Orders between 1912 and 1924. The Congress approved this method of establishing the Reserves through the enactment of the Pickett Act of 1910,

Pub. L. No. 61-303 (43 U.S.C. § 141), *repealed*, Pub. L. No. 94-579; see, § 701 (43 U.S.C. § 1701 note) Responsibility for the Reserves was initially placed under the jurisdiction of the Secretary of the Navy in 1920 then shifted to Secretary of the Interior in 1921 and thereafter back to the Secretary of the Navy where it remained until October 1, 1977 whereupon, the Secretary of Energy became responsible for the Reserves. (Department of Energy Organization Act of 1977, Pub. L. 95-91, 42 U.S.C. Section 5801.) The Secretary of Energy continues to bear that responsibility.

3. NPR-1 encompasses almost 48,000 acres of land. The United States owns (title to 36,454 acres and mineral rights to and additional 595 acres) approximately 80% of NPR-1 and Chevron U.S.A., Inc. owns (10,360 acres) approximately 20%. Chevron, previously the Standard Oil Company of California succeeded to the property rights of the Southern Pacific Railroad within NPR-1.

4. The participation of the United States and Chevron as owners is governed by a "Unit Plan Contract," (UPC) agreed to by the owners and authorized by the Congress in the Act of June 17, 1944, 10 U.S.C. Section 7426 *et seq.* The UPC establishes the respective rights (without affecting ownership) of both Chevron and the United States and governs the development and operation of NPR-1 as a "Unit" (pages 5 and 6 of the UPC, a true and complete copy of which is attached hereto as "Attachment 1"). Under the UPC, Chevron has approximately a 22% interest in the petroleum production from NRP-1 and the United States has approximately a 78% interest. The actual ownership interests or "percentage participation shares" vary slightly from one "zone," or subsurface hydrocarbon formation, to another (Attachment 1, UPC, pp. 6-8).

5. With the execution of the UPC in 1944, the owners (the United States and Chevron) combined their author-

ity to direct operations at Elk Hills and vested that combined authority in an Operating Commitee ("OC"):

> All exploration, prospecting, development, and producing operations on the Reserve shall be carried on under the supervision and direction of an Operating Committee consisting of two petroleum engineers, one of whom shall be appointed by and shall represent [DOE] and the other shall be appointed by and shall represent [Chevron]. * * * Subject to the other provisions hereof, the Operating Committee shall perform the following functions:
>
> (1) Determine the number of wells to be drilled on the Reserve necessary to secure and to maintain production under this contract, and the location and depth of each well.
>
> (2) Determine the rate at which each well should be produced in accordance with sound oil field engineering practices.
>
> (3) Inspect and supervise all exploration, prospecting, development and producing operations on the Reserve.
>
> (4) Require the use of sound oil field engineering practices designed to achieve the maximum economic recovery of oil from the Reserve.
>
> (5) Act with respect to such other matters as may be referred to the Committee from time to time by both [DOE and Chevron].

(Attachment 1, UPC, pp. 8 and 9, Section 3, para. (b)).

However, these functions are carried under the operational control of DOE:

> [DOE] shall, subject to the provisions hereof, have the exclusive control over the exploration, prospecting, development, and operation of the Reserve, and

> [DOE] may, in its discretion, explore, prospect, develop, and or operate the Reserve directly with its own personnel or it may contract for all or any part of such exploration, prospecting, development and/or operation with competent and responsible parties. Such contracts may be awarded by [DOE] either upon the basis of competitive bids by direct negotiation, in its sole direction, subject to applicable law, but [DOE] shall always use its best efforts to secure as economical an operation as is consistent with sound oil field engineering practices.

(Attachment 1, UPC, p. 8).

6. Although the UPC authorizes DOE to operate the Reserve with its own employees, the government has chosen instead to employ the expertise of a private sector contractor to perform the functions of operating and managing the Reserve subject to the terms of the contracts and the authority of the OC as set forth in the UPC. From 1975 to August 1, 1985, Williams Brothers Engineering Company ("WBEC") was the operating contractor for the Navy and DOE. From August 1985 to the present, Bechtel Petroleum Operations, Inc., ("Bechtel") has been the contractor for DOE. True and complete copies of the two WBEC contracts are attached hereto as "Attachment 2" (Navy Contract No. NOd-10068) and "Attachment 3" (DOE contract No. DE-AC01-80RA32049).

7. While the government retained overall management and policy direction for the development, exploration and operation of NPR-1, implementation of these programs and the day-to-day operation and maintenance of NPR-1 was accomplished through WBEC the operating contractor. (Attachment 2, Navy basic contract, pp. 4-5, sec. III, paras. (b) (c), and pp. 6-7, sec. IV, paras. (a) through (e); Attachment 3,¬DOE Modification A042, Statement of Work and Service, pp. 1 and 2).

8. Except for loss which might have resulted from WBEC's willful misconduct or absence of good faith, the government retained all financial risks under both WBEC contracts. For example, if personal property purchased by the operating contractor was damaged or lost or if a subcontractor failed to perform, the costs attendant to such losses or failure were born by the government (Attachment 2, Navy Modification P00006, pp. 3-5, para. (g); Attachment 3, DOE basic contract, Part II, sec. J, p. 16 para. J.12). Costs incurred by the operating contractor were paid with government funds and the terms of the contract. (Attachment 2, Navy basic contract, pp. 10-13, sec. V; Attachment 3, DOE basic contract, Part II, Sec. J, p. 16., para. J.12 and Additional General Provisions, p. 5, para. 7(b))

9. The operating contractor at NPR-1 has no ownership or possessory interest in government real or personal property. Title to any personal property the contractor may purchase with government funds passes from the vendor to the United States. (Attachment 2, Navy basic contract, p. 16, sec. VIII, paras. (b) and (c); Attachment 3, DOE basic contract, Additional General Provisions, p. 5, para. 7(b)).

10. From 1975-1980 WBEC disbursed its own funds for the operation of NPR-1 and was reimbursed by the United States. From 1980-1985 WBEC utilized a letter of credit account maintained by DOE with government funds. With the letter of credit account WBEC would write checks on the account to pay the costs of operations at NPR-1. The bank where the account was maintained each day would accumulate checks presented for payment and at the end of the day request a wire transfer from the U.S. Treasury for the total amount to be disbursed that day. Upon receiving the wire transfer of funds the DOE account would be credited and the checks presented for payment would be paid (Attachment 3, DOE basic contract, Part II, sec. J, p. 16, para. J.12). The procedures for maintaining and operating such a line of credit acount are contained in the U.S. Treasury Fiscal Requirements Manual, Part VI, Section 1020 (Attachment 4).

11. Under the contracts with the government, WBEC provided management services. Labor for all work covered by the Davis Bacon Act of 1931, 40 U.S.C. section 276a *et seq.*, (*e.g.* public works including drilling and construction of production facilities) which was performed at NPR-1 was to be supplied by subcontractors and not by the operating contractor. (Attachment 3, DOE basic contract, Part II, sec. J, p. 18, para. J.15). Among the contractual duties of WBEC at NPR-1 were the procurement and the monitoring of drilling and construction services of subcontractors. (Attachment 3, DOE Modification A042, Statement of Work and Services, p.3 Summary at Work and Services, para. b). However, WBEC was not financially responsible for the performance of the subcontractors or for the completion of the work required by those subcontracts. (Attachment 3, DOE Modification A042, Statement of Work and Services, p. 5, para. g).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 9th day of February 1989.

/s/ Kenneth W. Meeks
KENNETH MEEKS

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

DECLARATION OF RAYMOND HARBERT IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed February 15, 1989)

I, Raymond Harbert, declare and state:

1. From September 1975 to October 1987 I was employed by Williams Brothers Engineering Company ("WBEC"). From 1975 to 1985 WBEC was the government's operating contractor at the Naval Petroleum Reserve No. 1 ("NPR-1") located at Elk Hills, Kern County, California. From September 1975 to March 1982 I served at NPR-1 as WBEC's Assistant General Manager and Manager for Finance and Administration as such I was responsible for financial management, procurement, inventory control, personnel, management systems, office services (including recordkeeping) and administration of WBEC's contract to operate NPR-1. From April 1982 to October 1987 I served at WBEC's headquarters in Tulsa, Oklahoma as vice president and senior manager for WBEC's contract with DOE for operating of NPR-1. Although WBEC's contract with DOE ended in 1985, I continued to supervise the "close-out activities until my retirement in October 1987. I am presently self-employed as a management and engineering consultant.

2. NPR-1 is jointly owned by the United States and Chevron, U.S.A., Inc. It is operated through the cooperation of both owners according to the terms of the Unit Plan Contract ("UPC"), a congressionally sanctioned agreement between the parties. (A true and correct copy of the UPC is attached hereto as, Attachment 1.) Under the terms of the UPC the government is given control of exploration, prospecting, development and operation of NPR-1 and the discretion to operate with its own employees or to hire a contractor for that purpose (Attachment 1, p. 8, sec. 3, para. (a)). WBEC was hired to operate NPR-1 by the U.S. Navy from 1975 to 1977 and was subsequently retained by the U.S. Department of Energy ("DOE") from 1977 to 1985 when DOE took over responsibility for all the Petroleum Reserves.

3. As operating contractor for the government, WBEC was obligated by contract to apply its oil field expertise in the management and administration of NPR-1. (see, Attachment 2, p. 21, sec. X and Attachment 3, p. 1 *et seq.* Attachments 2, 3, 4, 6, 7-9, 12-13, and 23 hereto are excerpts from WBEC's contracts with the Navy and DOE for the operation of NPR-1. Because these contracts are voluminous they have not been attached hereto but, for true and complete copies of the contracts refer to the Meeks Declaration, filed herein, Attachments 2 and 3 thereto.) Typically, WBEC received technical direction from either the government (the Navy until 1977, DOE thereafter) or from the Operating Committee (OC), established under the UPC. The OC is composed of a representative of each of the two owners (the United States and Chevron, U.S.A., Inc.). Although DOE has control over exploration, prospecting, development and operation of NPR-1, these activities, according to the provisions of the UPC, are to be "* * * carried on under the supervision and direction of an Operating Committee * * *" (Attachment 1, p. 8, Sec. 3, para. (b)).

4. From 1975 to 1985 WBEC procured, except for some direct purchases made by the Government, all goods and services for operations at NPR-1 pursuant to its con-

tractual obligations to the government. Accordingly, as required by its contract with DOE (pertinent provisions of the DOE contract are at Attachment 4, para. J.23) and to ensure uniformity and compliance with government procurement policies and procedures WBEC published a manual, for use by WBEC's employees carrying on the procurement process. (Because the WBEC Purchasing and Subcontract Manual is voluminous, only pertinent portions are excerpted and filed herewith as Attachment 5). All of the procurement policies and procedures contained in the WBEC manual were approved by DOE and the OC.

5. Goods procured by WBEC for the government were either stored in inventory or installed immediately either by the government or by subcontractors. WBEC did not install or use the goods it purchased. Many of WBEC's procurements included machinery and equipment such as pumps, compressors, pipe, generators, tanks, and valves, all of which could be easily disassembled and moved from one site to another depending on where petroleum was being produced. WBEC procured other machinery and equipment including trucks, forklifts, and earth movers. Title to all goods purchased by WBEC for the government passed from the vendors directly to the United States pursuant to standard government procurement policy and property clauses contained in WBEC's contracts (pertinent contract provisions are at Attachment 6, Navy contract paras. (b)(c), DOE contract para. 7(b)); see also, 46 C.F.R. § 50-704.21).

6. In addition to procuring goods at NPR-1, WBEC also procured the services of other contractors, referred to as subcontractors. These independent subcontractors were the construction contractors which prepared sites for drilling oil wells, drilled wells, and constructed collection systems (systems of pipelines, valves, pumping stations and tank collection points used to move petroleum and its by-products from the well to natural gas separa-

tion plants and to storage tanks) natural gas plants, storage tanks for petroleum and natural gas, roads, fences and other support facilities. WBEC was always prohibited by the government from carrying on any construction activities, covered by the Davis Bacon Act of 1931, 46 Stat. 1494, as amended, (40 U.S.C. Section 276a *et seq.*), (construction and alteration or repair of public buildings or public works). Although, generally the Navy contract permitted WBEC to perform construction activities (Attachment 3, Navy contract para. (d)), in fact, WBEC was prohibited by the Navy from doing so and WBEC never performed as a construction contractor for the Navy. Similarly, DOE prohibited WBEC from engaging in construction activities and included the prohibition in the DOE contract (Attachment 7, para. J.15). Furthermore, it would have been impractical for WBEC to engage in construction activities because its employees were paid wages which had been negotiated with the Navy and later with DOE, while the Davis-Bacon Act would have required WBEC to pay construction workers wages which would have been determined by the U.S. Department of Labor. Thus, WBEC would have been required to maintain two wage structures and two sets of payroll records. Moreover, WBEC was not insured for the liability risks of a construction contractor, such as, for the loss of or damage to construction materials and equipment, for the costs attendant to the failure of subcontractors to perform including the cost of labor and materials for work in progress but not completed, or for post completion liability (pertinent contract provisions are at Attachment 8, Navy contract secs. XI and LV; Attachment 9, DOE contract para. 14; see also, 48 C.F.R. § 50.704-32). In addition, WBEC was not licensed by California to engage in construction or general contracting. However, all construction subcontractors at NFR-1 were required by their subcontracts to be licensed.

7. The relationship of WBEC to a drilling or construction subcontractor was always one of monitoring and inspection of ongoing work for quality assurance or to ensure compliance with the plans approved by the OC for a given project (see, pertinent contract provisions at Attachment 3, DOE contract p. 3, para. g; see also, OC minutes at Attachment 10, p. 2; and, drilling subcontract provisions at Attachment 11, p. 1, Article 1 and p. 2, Article 3). An example of WBEC monitoring for quality assurance was its inspection of drilling to ascertain whether it was being performed according to the engineering specifications contained in the drilling program, established by DOE's and Chevron's technical personnel and approved by the OC. Such specifications were incorporated into drilling subcontracts. For some subcontracts others performed the monitoring and inspection function such as the architect for construction of the administration building and the Navy for construction of the two natural gas separation plants.

8. WBEC was not financially responsible for the performance of subcontractors or for completion of work specified in the subcontract (pertinent subcontract provisions are at Attachment 11, p. 1, Article 1 and p. 2, Article 3; and, pertinent contract provisions are at Attachment 12, Navy contract sec. LV, DOE contract para. (b)). If, for instance, a subcontractor did not complete road construction in accordance with subcontract specifications and a second subcontractor was hired to complete the work, DOE, not WBEC, bore the risk of increased costs of labor and materials, lost time and opportunity due to inability to use the roads under construction, the cost of settling a claim by the defaulting subcontractor for partial payment and the cost of a lawsuit against the defaulted subcontractor for damages (see, pertinent DOE contract provisions allowing reimbursement of costs of litigation at Attachment 13, para. 13; a request for DOE's approval of a claim settlement as a reimbursable cost at

Attachment 14, and DOE's authorization to file a lawsuit, and thus, incur associated costs at Attachment 15; see also, para. 6 *supra*).

9. Moreover, WBEC could not direct the performance of the subcontractor or its employees; the subcontractor was operationally independent from WBEC (pertinent DOE contract provisions of a typical subcontract are at Attachment 11, p. 1., Article 1 and p. 2, Article 3). In the event a subcontractor did not meet its obligations under the subcontract or did not perform in compliance with project plans, WBEC had to obtain approval to take corrective action. If the failure of the subcontractor impacted project cost, approval of the OC would be necessary. If the failure affected only performance, approval of DOE would be necessary. With the approval of the OC or DOE, WBEC could terminate a subcontract, withhold pay from a subcontractor, and, in the event of default, award a substitute subcontract (a request for the OC's authorization to terminate a subcontract is at Attachment 16 and DOE's authorization to terminate two subcontracts and to pay costs is at Attachment 17).

10. All subcontracts entered into by WBEC were subject to the standard procedures contained in the WBEC Purchasing and Subcontract Manual for NPR-1 which had been approved by DOE and the OC. The broad general policies for every kind of procurement requiring the expenditure of government funds were contained in the section of the manual titled "Procurement Policy Statement" (Attachment 5, Section 810-001). Other portions of the manual provided explicit step by step procedures for the issuance of a Request for Proposal (RFP) and for the receipt and evaluation of bids, and for the award of a contract. (Attachment 5, Section 840-001, p. 8, paras. 13 and 14).

11. The procedures manual provided that RFP's were to be reviewed and approved by DOE before any solicitation was made. (Attachment 5, Section 810-001, p. 8)

DOE typically approved standard requirements and clauses, "boiler plate" of the RFP. After approval of the RFP by the OC, (pertinent documents are at Attachment 18) WBEC sent solicitation packages to contractors which had been preapproved by DOE and considered by the OC to be qualified to submit bids (a solicitation for applications to be placed on the approved list of bidders is at Attachment 19).

12. After bids were received by WBEC, they were required to be opened and reviewed in the presence of the OC (Attachment 5, Section 840-001, p. 10). WBEC evaluated the proposals, and made a recommendation to DOE and the OC for selection of a successful bidder. Selection was made by DOE and the OC (a recommendation is at Attachment 20). After selection, WBEC prepared the final subcontract and submitted it to the OC for final approval (a request for approval to award a subcontract is at Attachment 21). Thereafter, WBEC executed the subcontract.

13. This procurement process resulted in a subcontract between the successful bidder and WBEC in accordance with directions from the OC or DOE as party to the contract. Changes or modifications to outstanding subcontracts also required approval of the OC (a request for a change order is at Attachment 22).

14. From 1975-1980 WBEC was reimbursed by the United States for the costs of operating NPR-1. From 1980-1985, WBEC paid the costs of operating NPR-1 with DOE funds. In the latter case DOE maintained a line-of-credit checking account at a local bank upon which WBEC would write checks. Each day as checks were presented for payment against the account, the bank accumulated the checks and submitted a letter of credit drawdown electronically to the U.S. Treasury for the total disbursements for that day. The Treasury would then wire funds in the amount of the total daily disbursements and DOE's account would be credited (pertinent

disbursements and DOE's account would be credited (pertinent contract provisions are at Attachment 23).

15. On July 5, 1978, California issued a Notice of Determination to WBEC asserting a deficiency of $2,932,716.54, plus interest, in the payment of sales and use taxes for the years 1975-1977. On August 2, 1978, WBEC sought an administrative redetermination which resulted in an adverse decision on June 7, 1979. WBEC appealed this decision to the State Board of Equalization. On April 13, 1982 the Board affirmed the adverse redetermination (the decision is at Attachment 24) except for a reduction in the tax of $382,381.68. The residue consisted of tax of $2,550,334.86, with interest of $1,468,221.38, a total of $4,018,555.89. The Board's decision also provided that if the tax plus interest was not paid by May 1, 1982, interest of $25,503.54 would begin to accrue at a rate of 1% per month or fraction thereof, and if not paid by May 13, 1982 an additional penalty of $255,033.49 would be assessed. Thus, in an effort to avoid the additional interest and penalty, WBEC submitted a check to the Board on April 29, 1982. An action challenging the assessment was filed in Superior Court, Los Angeles County, by WBEC on February 18, 1983.

On December 13, 1982, a second Notice of Determination was issued by California to WBEC asserting a tax deficiency of $7,483,062.36, plus interest of $2,635,235.18, covering the period 1978-1981. Payment was made on December 23, 1982. WBEC appealed directly to the State Board of Equalization for a redetermination which resulted in an adverse decision. Thereafter, a second action seeking a refund was filed in Superior Court, Los Angeles County on October 26, 1983. During the pendency of both lawsuits WBEC and the State stipulated to partial judgments of $1,827,791.37 for the period 1975-1977, and $1,355,306.39 for the period for 1978-1981. The partial judgments were refunds for items purchased by WBEC and installed by Navy personnel rather than by subcon-

'ractors. Subsequently, both lawsuits were dismissed without prejudice; the earlier action was dismissed on January 25, 1988 and the later one on January 20, 1988.

I declare under penalty of perjury that the forgoing is true and correct.

Executed on this 9th day of February, 1989.

/s/ Raymond Harbert
RAYMOND HARBERT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed February 27, 1989)

The plaintiff, the United States of America, hereby opposes the motion for summary judgment of the defendants, the State of California and the California State Board of Equalization, on the grounds that (1) Williams Brothers Engineering Company (WBEC) was not subject to the sales taxes at issue here because the undisputed evidence in this case (the contracts between WBEC and the Government and the declarations of Government and company officials) demonstrates that WBEC was prohibited from engaging in construction and did not do so. WBEC was not responsible for the installation or affixation of the property it purchased, and was not responsible for the performance of the contractors who did the installation or affixation, and thus, WBEC's purchases were not purchases made in the performance of a construction contract and therefore, the sale for resale exclusion to the sales tax applies; (2) the two state court actions upon which the State bases its claim that the United States is precluded by the doctrines of res judicata and collateral estoppel from proceeding with the present action were dismissed without prejudice and were not final determinations on the merits; and (3) the United States is not barred by the appropriate statute of limitations from recovering the taxes paid by WBEC because this right of action for recovery of the payments arose when WBEC's claim for refund was denied by the State which

was well within the six-year period of limitations of 28 U.S.C., Sec. 2415(a).*

This opposition is supported by the attached memorandum of points and authorities, the Declaration of Raymond Harbert which is attached hereto as Exhibit A, the plaintiff's motion for summary judgment and accompanying exhibits and its supporting memorandum, and all other pleadings filed herein, all of which demonstrate that the motion for summary judgment of the defendants is wholly without merit and must be denied.

DATED: February 25, 1989.

Respectfully submitted,

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* The defendants have also argued that there is no constitutional prohibition to the imposition of the tax on WBEC, but that issue was not raised in the plaintiff's complaint or motion for summary judgment and is not an issue in this case. Consequently, it will not be addressed in this opposition or in the supporting memorandum of law.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

DECLARATION OF RAYMOND HARBERT IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed February 27, 1989)

I, Raymond Harbert, declare and state:

1. I am the declarant of the Harbert Declaration filed herein, as Exhibit B to plaintiff's motion for summary judgment and, as stated therein, I was employed by Williams Brothers Engineering Company (WBEC) at NPR-1, during the period relevant to the captioned action, as Assistant General Manager and Manager for Finance and Administration, and, thereafter at WBEC's headquarters in Tulsa, Oklahoma, as vice president and senior manager of WBEC's contract to operate NPR-1.

2. WBEC was obligated by its contract with the government to procure the goods and services necessary for the operation of NPR-1. In pursuit of this obligation WBEC executed subcontracts for the provision of construction services and other services in accordance with procedures approved by the government. The government was not a party to these subcontracts. In an attempt to clarify the fact that there was no contractual relationship between subcontractors and the government, the Navy, on July 8, 1977, (see, defendant's motion for summary judgment, Hennessy Declaration, Exhibit D, p.3, para. 2(a)) directed that a change be made to certain language con-

tained in requests for proposal subcontracts, and purchase orders. This change required that the words "prime contractor" be substituted for the word "agent" to more accurately describe the separation between WBEC and the government, and thus, not implicate the Navy as a party to subcontracts and purchases orders. The change was not an attempt to describe WBEC's relationship with subcontractors. In fact, no changes occurred in procurement procedures or practices or in WBEC's contractual obligations to the government as a result of the language change.

3. As operating contractor at NPR-1, WBEC was directed to concentrate effort on the management of the oil field. In pursuit of its management function WBEC inspected the work of independent drilling and construction subcontractors. To avoid a potential conflict of interest on the part of WBEC the government did not permit WBEC to engage in the same activities that it was contractually obligated to inspect for quality assurance. Thus, as a matter of policy, WBEC was prohibited by both the Navy and DOE from engaging in drilling or construction activities (see, plaintiff's motion for summary judgment, Harbert Declaration, para. 6). As in more fully described in paragraph 7 of the Harbert Declaration previously filed herein as Exhibit B to plaintiff's motion for summary judgment, WBEC was neither a general contractor with respect to the construction subcontractors nor responsible for the installation of affixation of goods purchased by WBEC but installed by the subcontractors.

I declare under penalty that the foregoing is true and correct.

Executed on this 22 day of February, 1989.

/s/ Raymond Harbert
RAYMOND HARBERT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed February 28, 1989)

In its Complaint for Declaratory Relief and For a Refund of Taxes, plaintiff United States seeks a declaratory judgment that William Brothers Engineering Company ("WBEC") was not a construction contractor under California law. (See ¶ 2 of Complaint.) The United States requests in the Complaint that this Court declare that under the terms and conditions of the contracts between WBEC and the government, WBEC was not responsible for the installation of property it purchased and thus was not a construction contractor under Regulation 1521.

In its Motion for Summary Judgment, the United States alleges that WBEC was not a construction contractor because the Navy and DOE prohibited WBEC from engaging in construction. There are a couple of problems with the United States' approach. First, it seeks a declaratory judgment on the meaning of the contract. The interpretation of the contract is the exclusive province of this Court and is a matter for summary judgment. The facts as submitted by the United States by means of the Harbert declaration does not establish their proposition as a matter of law. The facts relied upon by the United States cannot be gleaned from the contract or its modifications and merely indicates that

there is a triable issue of fact in how the contract was actually performed by WBEC. Thus, to the extent that the United States is correct there must be a trial on the issue of whether WBEC was prohibited from engaging in construction. The second problem of the United States is that it never alleged in its Complaint that WBEC was prohibited by the Navy and DOE from performing construction work.

In order to resolve the issue as a matter of law there must be no triable issues of act and that everything must be able to be resolved by interpretation of the contract before the Court. Thus, in determining whether WBEC is a construction contractor under its contract with the government, the only legitimate evidence is the contract and its various modifications.

ARGUMENT

I

THE CONTRACT BETWEEN THE UNITED STATES AND WBEC SPECIFICALLY PROVIDES FOR CONSTRUCTION WORK TO BE UNDERTAKEN BY WBEC

In reviewing the actual contract between WBEC and the government, it is clear that the real purpose of the contract was for WBEC to accomplish construction activity. Section IV of the original contract provides as follows in pertinent part:

> "(a) The *OPERATOR* [WBEC] shall perform, upon the terms and conditions hereafter set forth, the work of exploring, prospecting, developing, and operating the lands. . . .
>
> "
>
> "(d) *OPERATOR* shall perform on *NAVY*'s behalf directly or by subcontract [subject to Section XVII hereof], such operations, including the acquisition of materials and the construction of new facilities as may be necessary for the *NAVY* to receive and disperse its share of . . .

> "(e) The exploration, prospecting, development and operation of the unit . . . shall include, without being limited thereto, the following functions:
>
> "(1) The drilling and equipping of wells, including water and gas injection wells which are drilled at the direction of the *NAVY*.
>
> "(2) The deepening, redrilling, repairing, and cleaning out of wells.
>
> "(3) Exploration and prospecting.
>
> "(4) The shutting-in and/or abandonment of wells.
>
> "(5) The production of oil, gas, natural gasoline and associated hydrocarbons from the unit and non-unit lands under all conditions. . . ."
>
> "
>
> "(7) The furnishing . . . plus construction and maintenance of structures and facilities required for the work hereunder. . . ."
>
> "(9) The maintenance of all *UNIT* and Navy owned surface and subsurface facilities and equipment including roads.

See Meeks Declaration, Attachment 2, pages 6, 7, and 8.

In addition, DOE Contract No. EL-76-C-01-7001 Modification No. 32 provides as follows:

> "5. *New Development*. The drilling and completion of wells in the development program shall be subcontracted and supervised." There follows a listing of wells, total 94 in all. See Meeks Declaration, Attachment 2.

Furthermore, in DE AC01-80RA32049 Mod. A042, dated November 29, 1984, lists the following duties of WBEC:

"1. Drilling Operations.

"a. *Drilling Operations Management*—Responsible for management and operational aspects of site preparation, drilling, and completion of all new and redrilled oil wells, gas wells, injection wells, disposal wells, water source wells, and all major remedial work. . . .

"b. *Development Drilling*—Responsible for all operational aspects of drilling and completion of all new and redrilled oil wells, gas wells, water source wells, injection, and disposal wells.

"c. *Exploratory Drilling*—Responsible for all operational aspects of drilling and completion of exploratory wells.

"d. *Remedial Well Work*—Responsible for all major well remedial and stimulation work as required in order to maintain existing wells in optimum condition."

See Meeks Declaration, Attachment 3.

All of these provisions meet the definition of Construction Contract in Regulation 1521(A)(1)(a).

What is the evidence contained in the contract relied upon by the government that WBEC was prohibited from doing construction activity? Paragraph 6 of the Harbert Declaration states without any citations to any documents submitted to this Court that the Navy prohibited WBEC from performing construction activity. If true, this merely indicates a triable issue of fact. Further, paragraph 6 of the Harbert Declaration states that DOE included the prohibition in the contract. The only citation is Attachment 7 to the Harbert Declaration, Paragraph J.15. Atachment 7, paragraph J.15 states as follows:

"All Davis-BAct Covered Work (ACT of March 31, 1931 as amended (40 U.S.C. 2769-7)), should be performed by subcontract. (See provision 'Special Clause for Operating Contracts.'"

This is not a sufficient showing for the granting of Plaintiff's Motion for Summary Judgment that WBEC is not a construction contractor under Regulation 1521.

II

THE UNITED STATES HAS NOT SHOWN THAT UNDER THE CONTRACT WBEC WAS NOT RESPONSIBLE FOR THE AFFIXATION OR INSTALLATION OF PROPERTY

Although the United States attempts to combine the concept of no construction activity by WBEC and responsibility for final affixation, they are in fact separate arguments. The argument that WBEC was not a contractor goes to whether the WBEC contract with the government was a Construction Contract. In raising the specter of no financial responsibility, the government is attempting to take advantage of an exclusion in Regulation 1521. It is important to realize that in order to take advantage of this exclusion, the United States admits that the WBEC contract is a construction contract. Were it not a Construction Contract in the first instance, the exclusion in Regulation 1521 could not apply.

The United States also relies upon the Harbert Declaration for the proposition that WBEC was not financially responsible for the completion of work of the subcontractors. See Harbert Declaration, Par. 8. Yet, the evidence for the proposition cited by Harbert does not show that the contract itself provides that WBEC is not financially responsible.

First, it must be pointed out to the Court that WBEC executed a performance bond in the original amount of $5,000,000. See Schedule B to the original contract, Meeks Declaration, Attachment 2. This, by itself, indicates that WBEC has some financial responsibility for the performance of the contract. Second, Attachment 11 to the Harbert Declaration relied upon by the govern-

ment concerns Rotary Drililng Subcontractors, and states in Article 3:

> ". . . The work contemplated herein shall meet the approval of contractor and be subject to the general right of inspection herein provided, for contractor to secure the *satisfactory completion thereof.*" (Emphasis added.)

The fact is that independent contractors are used in Rotary Drilling Subcontracts dosen't mean the prime contractor, WBEC, is not responsible for the work performed. In fact, this contract provides the opposite. Third, the government relies upon Attachmcnt 12 to the Harbert Declaration, Section IV. This section provides:

> "(a) Except to the extent that the operator is *responsible under this contract for the deficiencies in the services required to be performed* . . . the operator shall not be liable by reason of operator's performance of services or delivery of materials under this contract, for loss of or damage to property of the Government occurring after government acceptance of the services." (Emphasis added.)

This provision indicates WBEC is in fact responsible under the contract for deficiencies in services to be performed. What it is *not* responsible for under this is only damage to property of the government after the government accepts the services. These provisions do not establish that WBEC was not financially responsible for the performance of subcontractors.

As pointed out in Defendants' Memorandum of Points and Authorities on page 17, Regulation 1521 excludes sonal property under what is otherwise a construction contract *if the person furnishing the property is not responsible* under the contract *for the final affixation or installation* of the property furnished." However, to fall under this exclusion, the construction contract itself must specify that WBEC is no tresponsible for the final affrom coverage for ". . . the furnishing of tangible perfixation or installation. There is no provision of the contract which plaintiff can point to that accomplishes this result.

The contract itself, as pointed out above provides that WBEC is in fact responsible. Section IV(d) provides that the *operator* will construct new facilities. Section IV (e)(7) provides that the *operator* will construct and maintain facilities. Section IV(e)(9) provides that the *operator* maintain roads, pipelines, powerlines, communication systems and building. Section XII(b) of the original contract provides that ". . . *OPERATOR* covenants to undertake primary responsibility for all services hereby contracted for. . . ." The contract does not provide that WBEC has no responsibility for affixation or installation of the property purchased.

In addition to all of this, on July 8, 1977, the WBEC subcontracts were amended to refer to WBEC as the prime contractor. See Declaration of Robert Milam, Exhibit D. All amendments entered into after this date identified WBEC as the prime contractor. A prime contractor, or general contractor, in the workaday world of construction is responsible for affixation or installation of property, even if done by a subcontractor.

III

THE DECLARATION OF HARBERT ESTABLISHES THAT THE UNITED STATES DID NOT SUE WITHIN THE PERIOD OF THE STATUTE OF LIMITATIONS

As pointed out in the Defendants' Motion for Summary Judgment, title 28 United States Code, section 2415 requires a quasi-contract lawsuit to be brought within six years of payment. The declaartion of Raymond Harbert establishes that WBEC paid to the Board of Equalization its payment of $4,018,555.89 on April 29, 1982. See par. 15 of Harbert Declaration. This suit was filed on May 12, 1988, more than six years after April 29, 1982. Thus, the United States has judicially admitted that as to the payment made on April 29, 1982, the cause

of action was not properly filed within the period of the statute of limitations.

IV

THE REAL ISSUE WHETHER OR NOT PROPERTY INSTALLED AND AFFIXED BY SUBCONTRACTORS UNDER THE DIRECTION AND CONTROL OF WBEC IS TAXABLE IS NOT ADDRESSED BY THE UNITED STATES

The United States in engaging in its very technical argument ignores the real issue in this case: is the property installed and affixed by subcontractors under the direction and control of WBEC taxable under California law? The answer its yes.

The declaration of Donald Hennessy establishes that prior to October 1, 1976, the vendors selling property to WBEC paid the appropriate sales tax to the defendant. WBEC reimbursed its vendors for the tax paid. Then, upon instructions from the United States, WBEC began issuing exemption certificates to the vendors so the vendors do not have to pay the tax. The rationale behind this was that the incidence of the tax was on the United States and therefore no tax was due.

However, in 1982 the United States Supreme Court in *United States* v. *New Mexico* 455 U.S. 720 (1982), settled whether the incidence of a tax was on the United States. To have the incidence on the United States, the entity must be an instrumentality of the United States. The *United States* v. *New Mexico* case removed any rationale for WBEC issuing exemption certificates to its third party suppliers. Yet, WBEC continued issuing the exemption certificates.

In the WBEC state court cases, WBEC showed that some of the material purchased by WBEC was, in fact, installed by the Navy. When presented with this information the Board made refund to WBEC for taxes paid on the Navy-installed material. Under Regulation 1521 this was non-taxable property.

In making its argument the United States is attempting to insulate WBSC from any responsibility for taxes on property either it installed or was installed by its subcontractors. This would effectively exempt this property contrary to the standards established in *United States* v. *New Mexico*. This is especially egregious when WBEC itself issued exemption certificates to its third party suppliers which exempted the vendors from paying the tax. There is no doubt that with such actions WBEC became the consumer of the materials purchased and thus became liable as a United States Construction Contractor under Regulation 1521.

CONCLUSION

In seeking declaratory relief in the meaning of the contract, the United States must rely upon only the terms of the contract itself. To the extent that the United States raises for the first time in its Motion for Summary Judgment that the contract wasn't performed as written, the United States merely raises a triable issue of fact.

The contract itself provides that WBEC is a Construction Contractor under Regulation 1521. The contract gives WBEC responsibility for construction of facilities and roads and exploration and developing various types of wells. The United States cannot be granted summary judgment on its motion because it hasn't shown the contract itself supports its position. In fact, it is clear that the contract itself supports Defendants' Motion for Summary Judgment that WBEC is a Construction Contractor as a matter of law.

The United States in arguing that WBEC was not financially responsible, admits that the WBEC contract is a construction contract but that an exclusion applies. The United States has not shown that the contract provides that WEBC was no responsible for the final affixation or

installation of the property. In fact, the contract provides the opposite and thus this Court should grant the Defendants' Motion for Summary Judgment that WBEC is a Construction Contractor as a matter of law.

In its Motion and supporting declaration the United States judicially admits that this suit was not brought within the proper statute of limitation as to one of the payments sought to be recovered. Thus, as a matter of law, that payment may not be recovered in this action.

DATED: February 24, 1989

Respectfully submitted,

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ROBERT F. TYLER
Supervising Deputy
Attorney General

By: /s/ Robert D. Milam
ROBERT D. MILAM
Deputy Attorney General
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

DECLARATION OF RAYMOND HARBERT IN SUPPORT OF PLAINTIFF'S MEMORANDUM IN REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed March 6, 1989)

The plaintiff, the United States of America, pursuant to the provisions of Rule 56, Fed. R. Civ. P. hereby submits the attached Declaration of Raymond Harbert in support of its memorandum in reply to defendant's opposition to plaintiff's motion for summary judgment. The declaration is also submitted in further support of plaintiff's motion for summary judgment.

DATED: March 3, 1989.

Respectfully submitted,

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Attorneys for Plaintiff,
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

DECLARATION OF RAYMOND HARBERT

(Filed March 6, 1989)

I, Raymond Harbert, declare and state:

1. I am the declarant of the Harbert Declarations filed herein, as Exhibits B (referred to here as Harbert Decl. I) to plaintiff's motion for summary judgement and as Exhibit A (referred to here as Harbert Decl. II) to plaintiff's opposition to defendant's moton for summary judgement, and as stated therein, I was employed by Williams Brothers Engineering Company (WBEC) at NPR-1, during the period relevant to the captioned action, as Assistant General Manager and Manager for Finance and Administration, and, thereafter at WBEC's headquarters in Tulsa, Oklahoma, as vice president and senior manager of WBEC's contract to operate NPR-1.

2. In Harbert Decl. I at paragraph 6 and in Harbert Decl. II at paragraph 3, I stated that WBEC was prohibited by both the Navy and DOE from engaging in Davis-Bacon Act covered activities which includes construction (*e. g.*, construction and alteration or repair of public buildings or public works).

Paragraph IV(c) of the WBEC/Navy contract authorizes the Navy at its election to perform any function assigned to WBEC under the contract, including construction, either with its own personnel or by separate contract. This is the contract provision which authorized the Navy

to prohibit WBEC from engaging in construction or other Davis-Bacon Act activities. Section IV, paragraph (c), of the WBEC/Navy contract is attached to Harbert Decl. I as Attachment 3. DOE's prohibition against construction by WBEC, is incorporated into the WBEC/DOE contract and for convenience is attached to Harbert Decl. I as Attachment 7, paragraph J.15.

3. When WBEC was hired by the Navy in 1975 the Navy required WBEC to obtain a performance bond (a copy of which is attached hereto as Attachment 1) in the amount of $5,000,000. The bond covered the performance of WBEC's activities and obligations under the WBEC/Naxy contract to operate NPR-1. The surety under the bond might have been required to make payments to the Navy if, for example, WBEC failed to hire competent personnel, failed to pay suppliers invoices or employee payrolls, or embezzled funds. After WBEC had performed satisfactorily as operating contractor for a year, the Navy directed WBEC to cancel the bond and remit to the Navy all refunded premiums (letter directing cancellation is attached hereto as Attachment 2). The bond was not a construction bond and did not cover the performance or failure to perform of subcontractors. Indeed, after cancellation of the bond no changes occurred in procurement procedures or practices or in WBEC's contractual obligations to the Navy. No subsequent bond was required either by the Navy or DOE.

4. In Harbert Decl. I, paragraph 8, I stated that WBEC was not financially responsible for a subcontractor's performance or failure to perform. Both the WBEC/Navy and WBEC/DOE contracts to operate NPR-1 were cost reimbursement contracts whereby, all costs of operation including all costs related to subcontractors' performance or failure to perform were reimbursed by the government. In the event a subcontractor failed to perform in accordance with the terms of its subcontract, any incidental costs associated with that failure, such as demolition and reconstruction costs, settlement costs, or litiga-

tion costs were reimbursed by the government under the contracts (see, Harbert Decl. I, paragraph 8 and attachments 13-15, thereto). If incomplete work required the hiring of a second subcontractor, similarly, the cost of the second procurement of services and the second subcontractor's costs would be reimbursed to WBEC under the operating contracts. WBEC was financially responsible only for the willful misconduct or bad faith of its officers (see, Harbert Decl. I, paragraph 8 and Attachment 12 thereto).

I declare under penalty that the foregoing is true and correct.

Executed on this 2 day of March, 1989.

/s/ Raymond Harbert
RAYMOND HARBERT

ATTACHMENT "1"

CONTRACT NO. NOd-10068

SCHEDULE B—PERFORMANCE BOND

No. 80322992

KNOW ALL MEN BY THESE PRESENTS, That we, THE RESOURCE SCIENCES CORPORATION and WILLIAMS BROTHERS ENGINEERING COMPANY, and each of them, Jointly and Severally of 6600 South Yale Avenue, of Tulsa, in the State of Oklahoma 74136, as Principal, and FEDERAL INSURANCE COMPANY, 51 John F. Kennedy Parkway, of Short Hills in the State of New Jersey 07078, as Surety, are held and firmly bound unto the United States of America in the penal sum of five million dollars ($5,000,000) lawful money of the United States for the payment of which sum well and truly to be made, we bind ourselves, and each of us, and each of our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas Principal entered into a certain Contract No. NOd-10068, with the United States of America, acting by and through the Secretary of the Navy, for the operation of Naval Petroleum Reserves in California.

NOW, THEREFORE, If Principal shall well and truly perform and fulfill all undertakings, covenants, terms, conditions and agreements of said contract during the term of said contract with or without notice to the Surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of

and concern to any such modifications being hereby waived by the Surety, then this obligation to be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, The parties hereto, by their authorized officers, have signed and sealed this bond this 5th day of August, 1975.

In presence of:

/s/ Illegible
Secretary

Attest:

/s/ Illegible
Secretary

THE RESOURCE SCIENCES CORPORATION

Principal

By: /s/ Charles T. Ray [SEAL]

WILLIAMS BROTHERS ENGINEERING COMPANY

By: /s/ Illegible
Title: Vice President

FEDERAL INSURANCE COMPANY

Surety

[SEAL]

Attest Witness:

/s/ Frances Tiederman
FRANCES TIEDERMAN, Secretary
(MARSH & MCLENNAN, INC.,
1579 East 21st Street,
Tulsa, Oklahoma #74114)

By: /s/ J. H. Taylor
J. H. TAYLOR
Title: Attorney-in-Fact
(MARSH & MCLELLAN, INC.,
1579 East 21st Street,
Tulsa, Oklahoma #74114)

(Usual acknowledgement and corporate authority of Principal and Surety to be atached to each copy of this Bond. NOTE TO SURETY: If this Bond is not signed by a corporate officer, a copy of the Power of Attorney for the person signing shall be attached to each copy of this Bond.)

DEPARTMENT OF THE NAVY
NAVAL PETROLEUM RESERVES IN CALIFORNIA
POST OFFICE BOX 11, TUPMAN, CALIFORNIA 93276
TELEPHONE (TAFT, CALIF.) 763-4131

NOd-10068
Serial: 1859
5 NOV 1976

From: Officer in Charge, Naval Petroleum Reserves in California
To: General Manager, UO-NPR #1 (Elk Hills)

Subj: Performance Bond of WBEC

Ref: (a) Operating Agreement Contract NOd-10068

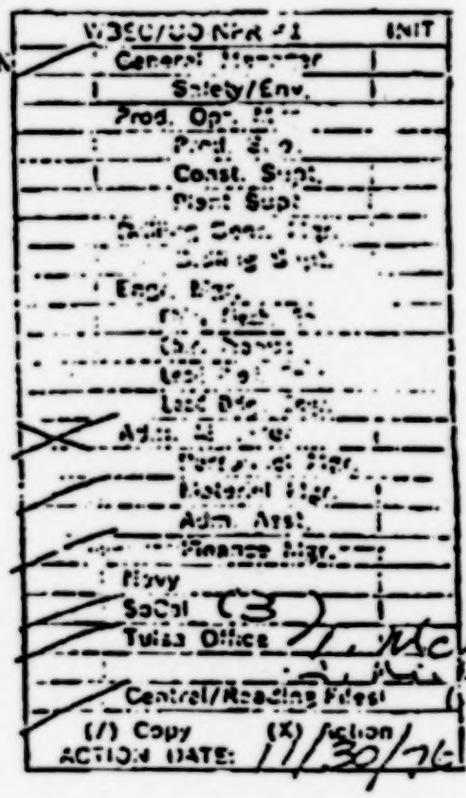
1. Williams Brothers Engineering Company obtained from Federal Insurance Company a performance bond, penal sum of $5,000,000, to cover its operations under reference (a). The cost of the bond was $125,000 for a term of five years.

2. Reference (a) has now been renewed until 30 September 1977. WBEC is directed to cancel the three years beyond 30 September 1977 remaining on the performance bond and refund to Navy that part of the $125,000 premium which is refunded to WBEC by Federal Insurance Company.

3. WBEC is requested to report in writing what action it has taken on this matter by 30 November 1976.

R. G. MARTIN

Copy to:
DNPR
Operating Committee



ATTACHMENT 2

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

[Caption Omitted]

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed March 6, 1989)

Defendant hereby replies to Plaintiff's Opposition to Defendants' Motion for summary Judgment. In its Opposition, the United States unfortunately confuses issues, makes arguments which are inconsistent with the facts in this case and consequently puts more heat than light on the issues before the Court. The United States argues that although the Williams Brothers Engineering Company ("WBEC") contract with Navy/DOE states that the operator [WBEC]" . . . will construct and maintain facilities" that language does not mean what its words say. This is the United States' approach throughout. Contrary to the wording of the contract, the United States argues that WBEC actually was prohibited from construction. Yet, there is no citation to the contract made by the United States that supports that proposition.

The United States also confuses the issues with respect to its argument on the application of the doctrine of Res Judicata/Collateral Estoppel. The doctrine goes to the question of whether the *state court actions* are the same, whether there is privity between WBEC and the United States, and whether the state court actions have been finally disposed of on the merits. The United States attempts to avoid the real issue by arguing that the

United States has a six-year Statute of Limitations under title 28 United States Code Section 2415. But in analyzing the Res Judicata/Collateral Estoppel issue, the Court must only be concerned with the state court actions. The Statute of Limitations for the United States to bring this federal action is another and different issue.

The United States also confuses the issues in its argument on the Statute of Limitations found in Title 28 United States Code Section 2415. The United States argues that the dates of a state administrative process for refund of taxes is the dates the federal Statute of Limitations begins to run on a quasi-contract action. The question to be resolved is when the United States can *first* sue the State of California for unjust enrichment. The fact is that it can first sue under Title 28 United States Code, Section 2415 on the date the money is paid to the State and there can be no extension of this time merely because WBEC was going through an administrative process which was a necessary prelude to a state court refund of taxes action.

ARGUMENT

I

THE PRINCIPLES OF RES JUDICATA/ COLLATERAL ESTOPPEL MANDATE DISMISSAL OF THIS CASE

There is no doubt that the principles of Res Judicata/ Collateral Estoppel apply to actions by the United States. See *Montana* v. *United States*, 440 U.S. 147 (1979). Under those principles a final judgment on the merits bars further claims by the parties or their privies upon the same cause of action. The United States does not contest the privity between WBEC in the state court actions and the United States. Similarly, the United States does not contest the fact that the causes of action are the same here as in the state court actions.

The only United States argument to the application of these principles is that the state court cases were not final determinations on the merits *because* those causes were dismissed "without prejudice" *and* the federal Statute of Limitations of 28 United States Code section 2415 allows the United States to bring this action. But here the United States is confusing the preclusive effect of Res Judicata Collateral Estoppel with statute of limitations restrictions. The two are wholly separate and independent issues.

The error of the United States is that it interprets the words "without prejudice" as meaning to give permission to another entity to bring another lawsuit upon the identical cause of action. If this were the real meaning then a dismissal "without prejudice" would overcome a Res Judicata/Collateral Estoppel argument in every case. Obviously, the term "without prejudice" in section 581 of the Code of Civil Procedure cannot be read so broadly. All that the term means is that the same suit by the same parties may be brought at a later date. As pointed out in Defendants' Memorandum of Points land Authorities, this cannot and does not give permission for the same lawsuit by the same parties if the statute of limitations on a second suit has run. Otherwise, the term "without prejudice" would be viewed as an indefinite extension of the statute of limitations on the second suit. Because the United States' position leads to such absurd results, this Court cannot seriously consider its argument as correctly stating the law.

The case of *King v. Superior Court*, 12 Cal.App.2d 501 (1936), dealt with a dismissal without prejudice filed at or during trial. The Court, on technical grounds, held that the dismissal was filed before trial, which puts it on the same plane as the dismissals in the WBEC state court cases. The *King* court stated the effect of the dismissal:

> ". . . has the effect of terminating it [the litigation] and the rights of the parties as affected by that particular action are concluded as the case had been determined on the merits though it is not a bar to a new action." *Id.* at p. 507.

Thus, a dismissal without prejudice is a determination on the merits but does not, by itself, bar a new action. If no new action is filed, then it is a determination on the merits. Similarly, if no new action may be filed because the statute of limitations has passed, the effect is the same. The United States ignores the dual test involved here: (1) Whether the dismissal itself bars a new action, and (2) whether a new action may be brought under the State Statute of Limitations by the same parties on the same cause of action. A dismissal with prejudice, by itself, bars a new action,[1] and when there has been a dismissal without prejudice *and* the running of the statute of limitations on a new action, it is clear that the effect is the same as a dismissal with prejudice.

It is clear that the state court actions concerned the same cause of action, that the United States was in privity with the plaintiff in the state court actions and the dismissal was a final determination on the merits. The United States is barred by the principles of Res Judicata/ Collateral Estoppel from bringing this suit.

The defendants' argument on Res Judicata/Collateral Estoppel is very clear. The state court actions were a final disposition on the merits because another state court action could not have been brought by WBEC on behalf of the United States. In making its argument, the United States ignores the effect of the privity between WBEC and the United States. Because of the strong showing of

[1] If the state court cases had been dismissed "with prejudice" it would be expected that the United States would take the position such a dismissal would not bar this suit because it is a different suit brought by a different party.

privity in Defendants' Cross-Motion for Summary Judgment, the United States is bound by the state court determination. The fact that under different conditions a quasi-contract action may be brought by the United States within six years of payment does not help the United States. The real issue is whether the United States is precluded by the principles of Res Judicata/ Collateral Estoppel from bringing this action.

II

WBEC WAS A CONSTRUCTION CONTRACTOR UNDER THE CONTRACT BETWEEN WBEC AND NAVY/DOE

The United States begins its analysis of whether WBEC is a contractor with an inapplicable premise. It states that there is no tax on retail sales to the government under Revenue and Taxation Code section 6381. The United States then states that this exclusion isn't available to construction contractors under Title 18, California Administrative Code, Regulation 1521. The United States then argues that the reason the transactions at issue herein are not taxable is that this restriction on taxing retail sales to the government becomes available to WBEC because it is not a construction contractor.

The United States' reliance on *Lockheed Aircraft v. State Board of Equalization*, 81 Cal.App.3d 257 (1978) is misplaced. *Lockheed* concerned only the transfer of personal property to the United States and the *Lockheed* Court held that Lockheed purchased the personal property for resale in its regular course of business. Lockheed was thus exempt from sales tax under California Revenue and Taxation Code section 6381.

The case at bar, however, concerns not section 6381 of the Revenue and Taxation Code but section 6384 of the Revenue and Taxation Code. In order to obtain the exclusion of Revenue and Taxation Code-section 6381, the

contract, as did the contract in *Lockheed*, must provide that personal property is being sold. That is not the case here. As held in the case of *C. R. Fedrick, Inc. v. State Board of Equalization*, 38 Cal.App.3d 385 (1974), there is a different tax treatment for contractors dealing with real property and in order to determine the correct rule of taxability one must distinguish real property from personal property. See also *Chula Vista Electric Co. v. State Bd. of Equalization*, 53 Cal.App.3d 445 (1974). Under regulation 1521, both United States contractors and private contractors are treated as retailers of machinery and equipment and consumers of materials. As to fixtures the United States contractor is treated as the consumer and a private contractor is treated as a retailer. The difference in tax treatment is that when one is a consumer of materials and fixtures a tax applies on the sale from the third party vendor to the contractor and when one is a retailer of machinery and equipment the tax applies on the transfer from the contractor to the owner. These principles have been upheld in *In re Howell*, 731 F.2d 624, 626 (9th Cir. 1984). Thus, the United States is essentially arguing that if WBEC is *not* a construction contractor because of its non-responsibility for final affixation or installation, then the contract is converted into one that provides for the selling of personal property to the United States government by WBEC. It would be error to read the contract before this Court as so providing.

The contract by its terms is either a construction contract or a contract ot resell personal property to the United States, there is no middle ground. In the case at bar, WBEC purchased personal property from wholesalers and instead of reselling to the United States Government as a retailer, WBEC incorporated this purchased personal property into real property owned by the United States. WBEC acted in this instance like any other contractor affixing personal property to real property. The California Sales Tax Law in this instance requires that the sales tax to be paid on the WBEC's purchase of the personal property from the vendors or for WBEC to pay a tax on items affixed to real property as the consumer of the property. This has been upheld by California and United States courts.

Thus when personal property becomes affixed to real property, the tax is not on retail sale to a consumer, but on the contractor as consumer of the materials because the personal property has been used up in its affixing to the real property. WBEC was not in the business of selling property to the United States government and the WBEC contract makes this clear.

Why does the United States even raise this as a question? The obvious reason is that the real issue as pointed out in Defendants' Opposition is whether the property included in these transactions were taxable to WBEC under the principles enunicated in *United States v. New Mexico*, 455 U.S. 720 (1982). The United States has decided it cannot use the *New Mexico* test to exempt these transactions and it is only through the inappropriate analogy to retail sales to the federal government, that the United States can justify arguing for WBEC's non-taxability. However, in this case the tax falls on WBEC, not an instrumentality of the United States, because WBEC issued exemption certificates to its third party suppliers. The transactions are not exempt from taxation, the only question is at what point the tax is to be paid; by the vendors or by WBEC. By its actions of issuing exemption certificates to its third party suppliers WBEC has resolved this question.

The United States admits that improvements to real property were made by arguing that the improvements were made by subcontractors. Thus, the United States admits that the regulation 1521 comes into play. But its argument that WBEC does not owe the tax results in complete non-taxability of a situation covered by regulation 1521. If WBEC is not a construction contractor,

then the third party suppliers indeed are exempt from tax on the sale of property to such entity performing work for the United States. The only other entity available to tax, the subcontractors, cannot be liable for the sales tax because the subcontractors made no purchase of materials which is the activation device for the sales/use tax liability. The result is that improvements to real property covered by regulation 1521 becomes completely non-taxable in spite of the numerous court decisions upholding the tax. This result would be error.

The United States engaged in sophistry and semantic games in order to avoid the characterization of WBEC as a construction contractor. On page 6 of its Opposition, the United States describes as baseless the defendants' contention that the contract itself must expressly state that the contractor is not responsible for affixation of property. The reason given is that regulations require only that under the construction *contract* the person not be responsible for the affixation or installation. The United States never explains the difference between what is an "express" statement of non-responsibility and non-responsibility "under the construction contract." These appear to defendant to be identical standards.

The United States' argument against WBEC being a construction contractor is basically that the construction contract was not performed as written. In all of its citations to the contract, not one supports the United States position that "Under the Construction Contract" WBEC was not responsible for the final affixation or installation of the property. For example, the citations by the United States to attachment 12 of the Harbert Declaration, Section LV, does not support the proposition that WBEC was not responsible for the final affixation or installation. That section is an extremely limited non-responsibility. As pointed out in Defendants' Opposition, page 8, subdivision A of this section states that WBEC is not responsible only for loss or damage to property *after* the government accepts the services. Subdivision

(b) of Section LV even removes this limited provision if WBEC or its officers act willfully or in bad faith. This does not amount to being not responsible for final affixation or installation "under the Construction Contract."

In fact, as pointed out in Defendants' Opposition on page 7, attachment 11 to the Harbert Declaration refers to WBEC as the contractor who must be satisfied that the job has been properly completed. In addition, attachment 4 to the Harbert Declaration provides:

> ". . . if the proposal includes work to be done by the contractor's personnel which is likely to involve a total cost in excess of $2,500 or such other amount as the operating committee . . . may from time to time establish, Director-NPRC, or his designee, prior to accepting or rejecting the proposal, *may* require the contractor to secure competitive bids." Emphasis added.

This is not a contractual provision which shows that "under the contract" WBEC had no responsibility. It merely shows that WBEC had to comply with the direction of its principal, a common contractual obligation.

The crux of the United States' argument seems to be that all *activity* undertaken by WBEC was done solely at the direction of the operating committee. See Plaintiff's Opposition, page 7, lines 9-10. Even if this is true, and it is not explicit in the contract, it does not amount to non-responsibility for final affixation or installation "under the contract."

The United States finishes its argument in its Opposition by arguing the words in the contract do not mean what they say. First, it says that section XII(b) of the contract is merely a transition provision. But this section provides as follows:

> ". . . *OPERATOR* covenants to undertake primary responsibility for all services hereby contracted for at midnight November 13, 1975."

See Meeks Declaration, attachment 2, page 22. What this section provides is a promise by WBEC to take primary responsibility for all activity after November 13, 1975. To say that this section is merely a transition provision is a gross misstatement of its effect.

In addition the United States takes issue with defendants' reliance upon the amendment to the subcontracts which refer to WBEC as the "prime contractor" as indicating its ultimate responsibility. But here again the United States' argument confuses the issues. The United States in its Opposition states that the intention of the amendment was to more accurately describe the contractual relationship of the Navy/DOE and WBEC. The Board believes this is true, that the term "prime contractor" does accurately describe WBEC's position under this contract. But, the United States argues the term "prime contractor" doesn't mean in this contract the same thing as in the construction industry. In addition, even though the subcontractors are referred to in the contract as subcontractors, the United States argues they were really not subcontractors, but were simply third parties who performed work. Thus, the United States argues that WBEC was not a prime contractor and that the subcontractors were not subcontractors of WBEC because WBEC was not responsible for anything. They make this argument in spite of the fact that the contract and the subcontracts refer to WBEC as the prime contractor and the third parties as subcontractors.

The United States' argument that the contract between WBEC and Navy DOE doesn't mean what it says cannot be take at face value. The United States asks this Court to issue a declaratory judgment on the meaning of the contract. Thus, when it argues that the contract doesn't mean what it says it is actually arguing against a declaratory judgment on the meaning of the contract. In addition, the inability of the United States to cite any provision of the contract which clearly provides that WBEC has no responsibility for affixation or installation

of property, means that any declaratory judgment on the meaning of the contract must be issued against the United States. The fact that the contract clearly provides that WBEC has the responsibility for affixation or installation of property mandates the granting of Defendants' Motion for Summary Judgment.

III

THE UNITED STATES IS BARRED BY TITLE 28 UNITED STATES CODE SECTION 2415 FROM RECOVERING THE PAYMENT MADE BY WBEC ON APRIL 29, 1982

The United States seeks to avoid the application of the Statute of Limitations by selecting certain portions of WBEC's state administrative appeal in an attempt to enlarge the time within which suit must be brought. The first questions that arises from this approach is whether WBEC's use of the state administrative process has any relationships to the right of the United States to bring suit under 28 United States Code section 2415.

WBEC has been shown to be the taxpayer in this action and as such filed the state court suits, acting on behalf of and under the direction of, the United States because the United States reimbursed WBEC for the taxes paid. But the right of the United States to recover in this action is not based upon the right to a *tax refund*, but to prevent the State of California from becoming unjustry enriched in a quasi-contract action. *U.S. v. State of Mich.*, 851 F.2d 803, 810 (6th Cir. 1988). This is so even if the United States phrased the complaint in terms of a tax refund.[2]

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[2] This is not a tax refund action because the State of California is constitutionally prohibited from taxing the United States or its instrumentalities. There is no allegation by the United States that the incidence of the tax fell on the United States or that WBEC

WBEC sought a refund of taxes through the proper state channels and the United States now seeks recovery of its reimbursed taxes to WBEC under a quasi-contract basis. There can be no extension of the United States' right to recover on this basis by WBEC's state administrative appeal. The only question, therefore, is when the United States can first sue the State of California on a quasi-contract theory. A related question is whether the United States was prevented, in some way, from suing the State of California on a quasi-contract theory because WBEC had not completed the state administrative process for a tax refund.

The answer to these questions is the United States could have sued at any time after the money had been paid to the state. Federal courts have often defined when the cause of action accrues under 28 United States Code section 2415(a). The holdings are consistent that the cause of action under this provision accrues upon payment. *United States v. Beck*, 758 F.2d 1553, 1558 (11th Cir. 1985); *United States v. Kass*, 740 F.2d 1493, 1497 (11th Cir. 1984); *United States v. De Kalb County*, 729 F.2d 738 (11th Cir. 1984); *United States v. Robert's Nursing Home, Inc.*, 710 F.2d 1275, 1279 (7th Cir. 1983); *United States v. Bellard*, 674 F.2d 330 (5th Cir. 1982); *United States v. Limbs*, 524 F.2d 799, 801 (9th Cir. 1975); *United States v. Skidmore, Owings & Merrill*, 505 F.Supp. 1101, 1104-1105 (S.D.N.Y. 1981). The fact is that the United States could have sued at any time after payment was made and that is the necessary accrual of a cause of action under 28 United States Code section 2415(a). This is precisely what the *State of Michigan* court stated.

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is a federal instrumentality under *United States v. New Mexico*, *supra*, 455 U.S. In fact, the sole basis of the United States' argument is that WBEC is not a construction contractor under *California law*.

The United States misperceives the effect of the statutes surrounding the state administrative process. It cites the provision of California Revenue and Taxation Code section 6564 that the order or decision of the Board upon a petition for redetermination becomes final 30 days after service upon petitioner. The consequence of this finality is that the amount becomes *due* and *payable* at the time the redetermination becomes final. In this case, the notice of redetermination was issued and served on April 13, 1982, for the amounts alleged in paragraph 16 of the Complaint. See Declaration of Donald Hennessy, Exhibit F. Under California Revenue and Taxation Code section 6565, the amounts became due and payable on May 13, 1982, *if* there had been no payment. But WBEC chose to make the payment on April 29, 1982. The United States may be correct in its assertions if payment had been delayed until May 13, 1988, and became due and payable upon finality. But the issue would have been precisely the same: When was payment made? The fact that WBEC chose to pay the taxes on April 29, 1982, makes the notice of redetermination final on that date.

Nor can the United States prevail upon its argument that it is the denial of the claim for refund that begins the statute of limitations of 28 United States Code section 2415(a). The cases have not only held that the cause of action accrues upon payment, but that it is not tolled by administrative hearings for the fixing of liability. *United States v. Beck*, *supra*, 758 F.2d 1553, 1558; *United States v. Kass*, *supra*, 740 F.2d 1493, 1497; *United States v. Robert's Nursing Home, Inc.*, *supra*, 710 F.2d 1275, 1279; *United States v. Skidmore, Owings, & Merrill*, *supra*, 505 F.Supp. 1101, 1104-1105. These cases concern situations where the United States must go through an administrative process. In the case at bar, the state administrative process for taxes does not apply to the United States' quasi-contract action.

In this argument, the United States confuses its rights and remedies with those of WBEC. This action, however, stands on its own as a quasi-contractual action for unjust enrichment. The United States' argument that the state statutes concerning state tax administrative process has some bearing on the statute of limitations faced by the United States in bringing this suit must be rejected.

CONCLUSION

Throughout this litigation, the United States has presented to this Court a classic example of *Ipse Dixit*, things are the way it describes only because it says so. The United States has a paucity of citations to cases supporting their legal position and their arguments on the meaning of the contract in issue are, in fact, shown to be wrong by the contract itself. Defendants request this Court to grant defendants' motion for summary judgment.

The first reason for granting the defendants' motion is that the privity shown between WBEC and the United States in the state court cases prevent the United States from relitigating the same question in a different court under the principles of Res Judicata/Collateral Estoppel. The second reason for granting the Board's motion for summary judgment is that the Board has shown that the contract between WBEC and Navy/DOE is a construction contract. In addition, the United States has not shown that WBEC meets the exclusion for non-responsibility for affixing or installing property. There is no doubt that WBEC, in fact, has such responsibility. If this Court should find that this action is not precluded by the doctrine of Res Judicata and finds that the contract is *not* a construction contract, then this Court must refuse to grant the United States a refund for the amount alleged in paragraph 16 of the Complaint because as to that payment, the United States did not sue within the applicable statute of limitations.

DATED: March 6, 1989

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General of the
State of California

ROBERT F. TYLER
Supervising Deputy
Attorney General

By: /s/ Robert D. Milam
ROBERT D. MILAM
Deputy Attorney General

Attorneys for Defendants

SUPREME COURT OF THE UNITED STATES

No. 91-2003

UNITED STATES, PETITIONER

v.

CALIFORNIA AND CALIFORNIA STATE BOARD OF EQUALIZATION

ORDER ALLOWING CERTIORARI. Filed October 5, 1992.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

October 5, 1992

☆ U. S. GOVERNMENT PRINTING OFFICE, 1992 342479 80001